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# CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

## Fourth periodic report of States parties due in 1995

## NEW ZEALAND

[7 March 2001]

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This report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999.

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## Introduction

1. This is the Fourth Report of the New Zealand Government, submitted under article 40, paragraph 1 (b) of the International Covenant on Civil and Political Rights. The report supplements New Zealand's Initial Report submitted in January 1982 (CCPR/C/10/Add.6), the Second Report submitted in June 1988 (CCPR/C/37/Add.8) and the Third Report submitted in December 1993 (CCPR/C/64/Add.10).

2. This report covers the period from January 1994 to December 1996 and has been prepared in accordance with the guidelines regarding the form and content of periodic reports from States Parties (CCPR/C/20/Rev.2). Reference should also be made to the core document on New Zealand (HRI/CORE/1/Add.33) submitted on 28 September 1993 in accordance with the guidelines contained in document HRI/1991/1. In a number of instances, information on developments occurring in the period after December 1996 has been included where it is thought to be relevant.

3. To keep the present report to a reasonable length, much supporting information has been incorporated in Annexes. It also should be noted that information about Parliament, the courts, legislation, and Government activity is readily available on the Internet (www.govt.nz). A draft of this report was circulated for public comment in late 1999, resulting in the receipt of five submissions that were considered in the preparation of the final report.

## PART I: GENERAL

### Overview

4. The period under review has seen a number of significant developments in the way in which New Zealand gives effect to the rights recognized in the International Covenant on Civil and Political Rights and seeks to develop their enjoyment by its people. Among these developments are:

- The Court of Appeal in *Simpson v. Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (attached as Annex A) established an implied remedy under the Bill of Rights Act 1990 in the form of a public law damages action (see paras. 13-15);
- The prominence of the Covenant before the Courts and in the Government's decision-making process (see paras. 40-48);
- The important enhancement of child protection, such as the creation of an extra-territorial offence prohibiting sexual conduct by New Zealanders with children in other countries (see paras. 207-208);
- A major review and improvement of provisions against domestic violence have been effected by means of the Domestic Violence Act 1995 (see paras. 196-199).

5. As for enactments, the period under review did not see such extensive legislative activity in the field of human rights as described in New Zealand's Third Report which covered the time of promulgation of the New Zealand Bill of Rights Act 1990 [Bill of Rights Act], the Privacy Act 1993 and the Human Rights Act 1993. It should be noted, however, as shown in the Third Report, that the Race Relations Act 1971 and the Human Rights Act 1977 have, as from 1 February 1994, been amalgamated in the last statute referred to - the Human Rights Act 1993 - which came into effect on that date. Inter alia, this Act maintains - as of continuing importance - the office and distinct identity of the Race Relations Conciliator, but accords him an extended jurisdiction and a wide educative role, which he has been pursuing. It is also worth remarking that age and family status, disability, employment status, political opinion and sexual orientation have now been included as new prohibited grounds of discrimination by the Human Rights Act 1993. As indicated in the Third Report, discrimination has been made specifically unlawful in such areas as education access and training, the provision of accommodation, the provision of goods, facilities and services, superannuation, and in employment. In addition to these Human Rights Act developments some important Amendment Acts have also addressed gaps or uncertainties in the criminal law protecting vulnerable members of society - notably in relation to female genital mutilation and the protection of children abroad.

6. In the realm of public policy, this report is of interest in:

- Recording the effects of the first elections conducted under the new (Mixed Member Proportional) electoral system (see paras. 219-220);
- Providing more detail on the working of the new Citizens Initiated Referenda Act (see paras. 221-228); and
- Showing the continued emphasis being given to the resolution of historic grievances of the Maori people of New Zealand (see paras. 245-281).

7. It will be apparent from this report and its Annexes that, in areas such as family violence (see paras. 196-199) and mental health (see paras. 101-106), serious problems persist and have required increased attention from the Government and society in general. As in the past, human rights issues over quite a wide spectrum have been the subject of lively debate both in Parliament and in the community, and of active consideration by relevant independent agencies such as the Human Rights Commission and the Law Commission, as well as by the courts.

**New Zealand Bill of Rights Act 1990**

8. During consideration of New Zealand's Third Report, the Human Rights Committee expressed concern that the Bill of Rights Act had no higher status than ordinary legislation. The Committee recommended that the courts should have the power to strike down legislation inconsistent with the Covenant rights affirmed by the Bill of Rights Act. It also recommended that there should be remedies for all persons whose rights under the Covenant have been violated.

9. A short history of the course of events that led to the enactment of the Bill of Rights Act was set out in paragraph 6 of the Third Report; and the factors weighed in proceeding with the Act in the form which it took - and which remain relevant - were further explained by the New Zealand representative to the Human Rights Committee on 23 and 24 March 1995 (CCPR/C/SR.1393-1395). The principal concern that led Parliament to decide against according the Bill of Rights a higher status than ordinary legislation was that this would involve a significant shift in the constitutional balance of power from Parliament to the judiciary. It was also considered that such a fundamental shift might lead subsequently to some intrusion of political factors in the appointment of members of the judiciary.

10. As noted in the Third Report, the Select Committee of Parliament that reported the Bill back to Parliament stated that "it may be some time yet before New Zealand is ready for a fully fledged Bill of Rights ...". Commentators have acknowledged that constitutional change of such magnitude normally requires wide support if it is to succeed and have drawn attention to the fact that in Canada, a country with a similar constitutional tradition, the development of a Bill of Rights Act into a supreme constitutional charter took place over more than 20 years.

11. Although the courts cannot strike down legislation, they do wield considerable power in protecting rights and freedoms. This has been achieved in a number of ways, including the judicial creation of new remedies to give effect to the rights guaranteed by the Bill of Rights Act (a significant development in the reporting period, and since) and the frequent and imaginative use of the direction in Section 6 of the Bill of Rights Act that legislation be interpreted consistently with rights and freedoms where possible.

*Remedies*

12. As regards remedies for breach of the Bill of Rights Act several important developments occurred:

- The recognition of compensation as a remedy (see paras. 13-15);
- The grant of stay of prosecution for undue delay and/or the failure to allow for testing of evidence (see paras. 16-17);
- Declaration of incompatibility (see paras. 18-19).

13. A leading development within the reporting period was the decision of the Court of Appeal in *Baigent's Case* [1994] 3 NZLR 667 (attached as Annex A) which established an implied remedy under the Bill of Rights Act in the form of a public law action for compensation. In that case the Court of Appeal reinstated claims against the Crown, struck out by the lower court, based on alleged breaches principally of Section 21 of the Act. Section 21 states that everyone has the right to be secure against unreasonable search or seizure and corresponds to article 17 of the Covenant. The Court of Appeal held that in certain cases breaches of the Act could be remedied by an award of damages, notwithstanding the absence of an express provision on remedies in the Act. An action for such compensation under the Bill of Rights Act was not a

private law action but an action in public law based on the Crown's liability for ensuring compliance with the Act, and as such not affected by statutory immunities protecting the Crown from vicarious liability. The case represents a significant point in the evolution of the judicial interpretation of the Bill of Rights Act. The majority judges had particular regard to article 2 (3) of the Covenant, which requires each State Party to ensure that an effective remedy is available to any person whose rights, as recognized by the Covenant, have been violated (*Baigent's Case* [1994] 3 NZLR 667, 676 per Cooke, P. (as he then was), 691 per Casey, J., 699 per Hardie Boys, J.).

14. Following *Baigent's Case*, Bill of Rights claims for compensation have been considered by the courts in other cases. Bill of Rights compensation was awarded, for example, in *Upton v. Green (No. 2)* (1996) 3 HRNZ 179 in an amount of NZ$ 15,000 for breach of the right to natural justice by a judge. In terms of matters arising outside of the reporting period, in *Dowlen & Others v. Attorney-General* [2000] 3 NZLR 136 Bill of Rights compensation awards were made to the plaintiffs for unreasonable searches and arbitrary detention, the highest single award being NZ$ 18,000 to one of the applicants.

15. *Baigent's Case* prompted the question of whether the subject of remedies under the Bill of Rights Act should be left to be further developed judicially, or whether legislative clarification or reform might be desirable. Accordingly, the Government asked the New Zealand Law Commission to consider *Baigent's Case* in the wider context of its work on a more general project relating to Crown liability. Subsequently, after the period covered by the present report to the Human Rights Committee, the Law Commission has issued a study endorsing the approach taken by the Court of Appeal, and concluding that no legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act established in *Baigent's Case* (*Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v. Derrick*, NZLC R37, Wellington 1997, attached as Annex B).

16. In *Morton v. Tauranga District Court* [1995] 2 NZLR 419 the Court of Appeal held that a stay of proceedings was the appropriate remedy for a 17 month delay from charge to trial date. A delay of such length was found to be, on the facts, a breach of Section 25 (b) of the Bill of Rights Act (the equivalent of article 14 of the Covenant) (see also below paragraph 148). In the recent case of *Dalton v. Police* (1999) 5 HRNZ 415 (HC) the accused had been convicted and sentenced. On appeal, the Court held that there had been an unreasonable delay in trying the accused. Accordingly, the accused was discharged without conviction. However, the remedial power under Section 25 (b) of the Bill of Rights Act will arise in a narrower range of cases than the powers under the inherent common law jurisdiction and under Section 347 of the Crimes Act 1961. This is because a finding of a breach requires that there must have been undue delay after a person has been charged with an offence, while the common law applies to pre-charge delay as well.

17. The inadmissibility of evidence is a long established remedy under the Bill of Rights Act developed by the courts and has been referred to already in the Third Report (see Third Report, para. 47). The courts have continued to apply this remedy in appropriate cases.

18. In a recent development the Court of Appeal in *Moonen v. Film and Literature Board of Review* (1999) 5 HRNZ 224, 234 paragraph [20] (attached as Annex C) observed:

> [that it had] the power, and on occasion the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the United Nations Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.

19. A declaration of incompatibility as indicated in *Moonen* was then made in the case of *R. v. Poumako* [2000] 2 NZLR 695 by the dissenting judge.

*Section 6 – Interpretation consistent with the Bill of Rights Act*

20. Judicial pronouncements within the reporting period demonstrate that the courts are utilizing the direction in Section 6 of the Bill of Rights Act to accord preference to meanings of enactments that are consistent with the rights and freedoms contained in the Act. In *Baigent's Case* (above para. 12), for example, the Court of Appeal applied Section 6 in conjunction with Sections 3 and 21 of the Bill of Rights Act when interpreting Section 6 (5) of the Crown Proceedings Act 1950 determining whether proceedings could be brought against the Crown for a search in bad faith by the police. The Court concluded that "[i]t is consistent with that affirmed right [right to be secure against unreasonable search and seizure] to interpret Section 6 (5) of the Crown Proceedings Act as not protecting the Crown from liability for the execution of a search warrant in bad faith" (*Baigent's Case* [1994] 3 NZLR 667, 674 per Cooke, P. (as he then was)).

21. In *Elwen Industries Ltd. v. Comptroller of Customs* (1993) 1 HRNZ 574 the High Court interpreted a provision in customs legislation authorizing the taking of security for goods seized as forfeit to the Crown in such a manner as to ensure compliance with the right to be free from unreasonable seizure (Section 21 of the Bill of Rights Act). This was required by Section 6 of the Bill of Rights Act even though prior to the Bill of Rights Act the provision would not have been interpreted that way.

22. In the above-mentioned *Moonen* decision (above para. 18) the Court stated that "where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. Thus if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted" (*Moonen v. Film and Literature Board of Review* (1999) 5 HRNZ 224, 233 para. [16]). When considering the meaning of the words "promotes or supports" in Section 3 of the Films, Videos, and Publications Classification Act 1993 the Court emphasized that a Bill of Rights consistent approach was required and that those words had to be given such available meaning which impinges as little as possible on freedom of expression. The Court of Appeal went a step further in the recent decision of *Poumako* where notwithstanding strong observations in the

parliamentary debate favouring a broad retrospective application of a new parole regime a majority of judges expressed a preference for an interpretation of the relevant provisions in light of the Bill of Rights Act contrary to parliamentary intent. The Court of Appeal stated (*R. v. Poumako* [2000] 2 NZLR 695, 702):

> The meaning to be preferred is that which is consistent (or more consistent) with the rights and freedoms in the Bill of Rights. It is not a matter of what the legislature (or an individual member) might have intended. The direction is that whenever a meaning consistent with the Bill of Rights can be given, it is to be preferred.

23. Finally, commentators have noted that the approach the courts have adopted to the interpretation of the Bill of Rights indirectly places a check on executive action in addition to the mechanism established by Section 7 of the Act. (As indicated in New Zealand's Third Report, that section requires the Attorney-General to report to Parliament any inconsistencies in proposed legislation with the rights and freedoms contained in the Bill of Rights.) While remaining within the appropriate realm of statutory interpretation, the courts should continue to ensure a level of protection for human rights in New Zealand similar in large measure to that achieved in jurisdictions where a Bill of Rights or its equivalent has the status of superior law.

**Assessment of Legislation for Compliance with the Bill of Rights Act**

24. It may be that the Human Rights Committee's concern that the Bill of Rights Act should have superior law status stems in part from a perception that, because Parliament is able to pass legislation despite a report from the Attorney-General under Section 7 of the Act, some legislation may in fact have been enacted which is in breach of the Act and possibly the Covenant.

25. In considering New Zealand's Third Report, the Committee remarked that in two instances legislation had been enacted notwithstanding reports by the Attorney-General under Section 7 that the enactments would be inconsistent with the Bill of Rights Act. It is also important to note, however, that in each case the Attorney-General's report was challenged on the ground that there was in fact no breach of the Bill of Rights. Those challenges were directly considered by the relevant Select Committee of Parliament and the record shows that they were taken into account by Members of Parliament.

26. In view of the Human Rights Committee's interest in this matter, it may be useful to describe more fully the Attorney-General's vetting role under Section 7. (It should also be noted that it is a requirement of the Cabinet Office Manual that papers put to Cabinet proposing legislation must certify compliance with relevant international obligations, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the Treaty of Waitangi.)

27. Section 7 constitutes a safeguard designed to alert Members of Parliament to legislation which may give rise to an inconsistency with the Bill of Rights Act and, accordingly, to enable them to debate the proposals on that basis (see *Mangawaro Enterprises Ltd. v. Attorney-General* [1994] 2 NZLR 451, 457). The role of scrutinizing bills for consistency with the Bill of Rights Act and providing advice to the Attorney-General on the exercise of his or her duties under

Section 7 is performed by the Ministry of Justice (in the case of legislation being promoted by a Minister other than the Minister of Justice), and by the Crown Law Office (in the case of legislation being promoted by the Minister of Justice).

28. The steps undertaken in assessing a Bill for consistency are as follows:

- Assess the interpretations to which a specific apparently offending provision is open;
- Ascertain the scope of the right in question;
- Assess the provision in the light of the right, to test for prima facie consistency; and
- If prima facie inconsistent, apply the justified limitation test in terms of Section 5 of the Act.

29. Section 5 of the Bill of Rights Act provides that the rights and freedoms contained in the Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In determining whether a limitation is "demonstrably justified", the Ministry of Justice and the Crown Law Office followed during the reporting period the Canadian approach known as the *Oakes Test* (*R. v. Oakes*, [1986] 1 S.C.R. 103). However, the Court of Appeal in its above-mentioned *Moonen* decision (above para. 18) set out its own test (which is not substantially different from the *Oakes Test*) to determine whether or not a limitation is "demonstrably justified" (*Moonen v. Film and Literature Board of Review* (1999) 5 HRNZ 224, 234 para. [18]):

- Identify objective which the Legislature was endeavouring to achieve by the provision in question;
- Assess the importance and significance of that objective;
- The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective;
- The means used must also have a rational relationship with the objective;
- In achieving the objective there must be as little interference as possible with the right or freedom affected;
- The limitation involved must be justifiable in light of the objective.

30. The issues which arise in the vetting process are frequently complex, and in a number of circumstances it is quite possible for there to be reasonably held competing points of view as to whether a provision does or does not infringe the provisions of the Act. The vetting exercise is not infrequently conducted at short notice and it is possible that further evidence may emerge after the vetting exercise is completed which supports a different conclusion. Unsurprisingly, therefore, the exercise of the Attorney-General's powers under Section 7 has been marked by debate.

31. In some circumstances where a report has been given under Section 7, legal commentators have questioned whether the provision at issue actually infringes the Act. On other occasions, commentators have suggested that a report ought to have been given, in circumstances where it was not. Given the open-textured character of the provisions of the Bill of Rights Act, and the attendant scope for, and indeed necessity of, making value judgements, differences of opinion on the exercise of the power in particular cases are inevitable and a sign of healthy debate. Experience with the operation of Section 7 may lead to consideration of ways in which the section itself and the procedures followed under it can be improved.

32. As already indicated, the Bill of Rights Act vetting procedure provides a valuable constraint on the law-making process, focusing minds on whether new laws comply with the rights protected by that Act. The mechanism is complemented by the practice of asking the Crown Law Office in difficult cases for an opinion about the consistency of a bill with the Bill of Rights Act during and after the Select Committee hearing and the emerging possibility that the Court of Appeal will issue declarations of incompatibility if it finds legislation inconsistent with the Bill of Rights Act (above para. 18).

33. The broad point is that the Bill of Rights Act does provide a valuable standard against which proposed legislation can be measured. The law-making process, including the parliamentary process, together with the interpretative process in the courts, does ensure that guaranteed rights are considered for due protection and that any limits are the result of a deliberate, rational process in which competing values have been considered.

34. The Attorney-General may, at his or her discretion, waive legal professional privilege and agree to the release of advice provided on the consistency of bills with the Bill of Rights Act. This has occurred on numerous occasions. In this way, in appropriate instances, the Section 7 process ensures a healthy debate on human rights issues.

**Optional Protocol**

35. As explained in New Zealand's Third Report, the first Optional Protocol to the International Covenant on Civil and Political Rights entered into force for New Zealand on 26 August 1989. The text of the Optional Protocol was presented to Parliament and published for reference as *New Zealand Treaty Series 1989, No. 12*, and as *Parliamentary Paper A.103* appearing in the Appendices to the *Journals of the House of Representatives for 1991-93*.

36. In the period between January 1994 and December 1996, the Centre for Human Rights forwarded to the Government of New Zealand three communications from individuals subject to New Zealand jurisdiction alleging violation by New Zealand of its obligations under the International Covenant on Civil and Political Rights. The first communication alleged discrimination in New Zealand's treatment of individuals who had been prisoners of the Japanese army during World War II, and the Government's signing of the 1951 Treaty of Peace which released Japan from further reparation obligations. The second communication concerned criminal proceedings against an individual and his treatment in prison. The final communication related to the Government's decision to enact the Citizenship (Western Samoa) Act 1982.

37. During the period under review the Human Rights Committee did not consider any communications submitted by individuals alleging violation of their rights by the New Zealand Government, and therefore no information has been included in the present report as to any action taken in relation to views of the Committee in such a context. Nevertheless, in the event that the Committee were to express views suggesting possible non-compliance, the New Zealand Government could be expected to weigh those views carefully. This would be likely to involve a review of the finding by all relevant government agencies leading to consideration of a report by Government, so that it might be in a position to decide how to respond to any concerns raised by the Committee (the Committee's comments on New Zealand's Third Report, para. 24 refers).

38. Up to 1998, the Human Rights Committee had found three communications against New Zealand to be inadmissible. The first communication was noted in New Zealand's Third Report and concerned an individual's allegation that provisions of New Zealand's Social Security legislation violated equal protection under the law. The second and third communications to be dismissed by the Committee in 1997 concerned alleged violations affecting former prisoners of the Japanese army during World War II, and an individual convicted and imprisoned for certain sex offences.

39. As to the final communication referred to in paragraph 36 above, the Human Rights Committee found in 1998 the communication against New Zealand to be admissible in part, and requested certain relevant information which was supplied by the New Zealand Government in 1999. The Committee has since found there to have been no violation of rights under the Covenant in relation to this Communication. The Committee found the Communication made in respect of the Treaty of Waitangi (Fisheries Settlement) Act 1992 admissible in part in 1995, and has since found there to have been no violation of rights under the Covenant. Further information regarding the Committee's subsequent consideration of communications will be included in New Zealand's next periodic report.

**Prominence of the International Covenant on Civil and Political Rights in Domestic Law**

40. Jurisprudence has developed in New Zealand which recognizes the value of international agreements as tools for interpreting the legislative provisions which implement them into domestic Law. The Bill of Rights Act and the Human Rights Act 1993 are designed to implement New Zealand's international obligations. Therefore, the judicial interpretation or application of those Acts will involve references to the relevant international conventions such as the International Covenant on Civil and Political Rights. There have been numerous decisions in New Zealand which refer to international treaties and in particular the International Covenant on Civil and Political Rights. A few examples of judicial decisions are given to illustrate the use of the Covenant.

41. The Covenant figured in the Court of Appeal's deliberations in the widely discussed case of *Tavita v. Minister of Immigration* [1994] 2 NZLR 257, which involved judicial review of a decision made by the Minister of Immigration. The Minister had dismissed an appeal by an overstayer against the execution of a warrant for his removal from New Zealand. Before the Court of Appeal it was submitted that removal should not occur in light of developments in respect of the overstayer's family situation (specifically the birth of a child). It was submitted

that the Rights of the Child Convention and the International Covenant on Civil and Political Rights were relevant and should be considered by the Minister. The Court held that the Minister should have the opportunity to consider such international aspects in reviewing the exercise of his discretion under the legislation. The matter was referred back to the Minister, and the advice provided by the Court was taken.

42. In the already mentioned *Baigent's case* (above para. 13) the Court justified the creation of the Bill of Rights compensation remedy by reference to the Long Title of the Bill of Rights Act which affirms New Zealand's commitment to the Covenant and by reference to article 2 (3) and article 17 of the Covenant (*Baigent's Case* [1994] 3 NZLR 667, 676 per P. Cooke and in particular 691 per J. Casey). Reference was made to certain views of the Human Rights Committee in support.

43. A recent statement of principle is found in the decision of *Wellington District Legal Services Committee v. Tangiora* (1998) 4 HRNZ 136 (CA) (see also below paragraph 277). The Court affirmed the presumption of statutory interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations. That presumption may apply whether or not the legislation was enacted for the purpose of implementing the relevant text (147 et seq.).

44. This principle was further exemplified by the Court of Appeal in *Quilter et al. v. Attorney-General* (1998) 4 HRNZ 170 (see also below paragraphs 200-204). In this decision the Court, when determining the meaning of discrimination under Section 19 of the Bill of Rights Act, referred to the relevant international human rights instruments including the Covenant (181 per J. Thomas, 211 per J. Keith).

45. In *Manga v. Attorney-General* (1999) 5 HRNZ 177, 185 (HC) reference to article 9 of the Covenant and decisions of the Human Rights Committee was made when deciding the meaning of "arbitrary" in Section 22 of the Bill of Rights Act.

46. However, there are limits to the use of international materials in interpreting domestic human rights statutes. In particular, if Parliament has deliberately chosen to under-incorporate an international obligation, it will be difficult to convince the courts to remedy the deficiency. Thus, in *R. v. Barlow* (1995) 2 HRNZ 635 (CA) the Court noted that while the Covenant contains a general affirmation of the right to liberty and security of the person the Bill of Rights Act does not. The Court regarded this departure from the working of the Covenant as "a deliberate decision on the part of the Legislature" (655 per J. Richardson (as he then was)) and declined to give the closest equivalent Bill of Rights Act provision a meaning which fully conformed to the relevant Covenant provision.

47. Use of international human rights norms is not confined to the courts. The Cabinet Office Manual (3rd ed., Cabinet Office, Wellington, August 1996) requires all legislative proposals to have regard to international obligations. The Cabinet Office Manual also requires that the report of the Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (revised ed., Department of Justice, Wellington, 1991) which emphasizes the importance of the compliance of legislation with international treaties is to be taken into account when developing legislation.

48. The Law Commission with its report, *A New Zealand Guide to International Law and its Sources* (NZLC R34, Wellington, 1996, attached as Annex B), aimed to remedy its concern that there was a relative lack of awareness of international law in New Zealand, and in particular of New Zealand's international rights and obligations. The report aims to contribute towards remedying this problem by providing a basic guide to international law as it affects New Zealand law, and to the materials which help to find, interpret and understand international law. Furthermore, the Law Commission examined particular rights and freedoms recognized by the Covenant when preparing its reports on *Community Safety: Mental Health and Criminal Justice Issues* (NZLC R30, Wellington, 1994, attached as Annex B) and *Police Questioning* (NZLC R31, Wellington, 1994, attached as Annex B).

**Question of the Ultimate Court of Appeal for New Zealand**

49. The Human Rights Committee, when discussing New Zealand's Third Report, showed interest in knowing what entity might replace the Privy Council if the New Zealand Government proceeded with the idea of abolishing the right of appeal to the latter body (as mentioned in paragraph 18 of New Zealand's Second Periodic Report under the Covenant). There is as yet little more to convey to the Committee in this regard. On 4 May 1995, the Attorney-General publicly released a detailed report from the Solicitor-General on the future of appeals to the Privy Council, and submissions on this document were invited. Later, on 18 June 1996, a short "New Zealand Courts Structure Bill" was introduced in the New Zealand Parliament, inter alia envisaging the abolition of appeals to the Privy Council: in its place the New Zealand Court of Appeal, in a somewhat expanded form, would be the final Court, operating in a system allowing a single right of appeal to a Court comprising the judges most appropriate to decide a particular case. However, the question whether to abolish appeals to the Privy Council has not been the subject of further development and the Bill was dropped from the legislative calendar. Among the variety of issues raised in relation to the proposal have been the value that Maori have placed on appeals to the Privy Council, the interest expressed by the business community, and the question of whether New Zealand should have a written Constitution.

**Reports of the Cook Islands and Niue**

50. In its consideration of New Zealand's Third Periodic Report, the Committee sought information on the extent of New Zealand's "remaining jurisdiction over the Cook Islands and Niue" and sought clarification of the measures envisaged to comply with reporting requirements under the Covenant. At that time, New Zealand explained the evolving constitutional personalities of the Cook Islands and Niue, which are self-governing States in free association with New Zealand, noting that under these relationships it is for the Cook Islands and Niue to produce their own reports to international human rights bodies. It was noted that New Zealand stood ready to facilitate any such reports. During the reporting period and more recently, New Zealand has taken appropriate opportunities to draw to the attention of the Governments of the Cook Islands and Niue their obligations to report under the Covenant, and to note New Zealand's readiness to provide technical assistance in this regard.

## PART II: INFORMATION RELATING TO SPECIFIC ARTICLES

### Overview

51. In this Part, reference is made to significant changes to legislation, policies and practices relating to human rights as well as important judicial decisions made during the reporting period. Issues raised by the Human Rights Committee during consideration of New Zealand's Third Report are discussed and in some cases elaborated upon, and inquiries in progress at the end of the last reporting period are updated.

52. Only those articles of the Covenant in respect of which there have been relevant changes or developments are addressed.

53. In the preparation of this report, regard has been given to the concerns, suggestions, and recommendations expressed by the Human Rights Committee in relation to New Zealand's Third Report. Comments made by the Committee are dealt with as follows in this report:

*Desirability of a Comprehensive Bill of Rights with Superior Law Status*

The status of the Bill of Rights Act was the subject of extensive consultation when that measure was going through the legislative process. As noted above (paras. 8-11), it is possible that, in time, support may develop for its enactment as superior law, but it is considered that the present systems in New Zealand provide an appropriate level of protection to fulfil, in practice, New Zealand's obligations under the Covenant.

*Absence of Express Provision for Remedies*

As discussed above (paras. 13-15), the courts have established that a person whose rights under the Bill of Rights Act have been breached has a course of action in public law for monetary compensation against the Crown. The Court of Appeal has also indicated that it may be prepared to formally declare legislation incompatible with the Bill of Rights Act (above para. 18).

*Suggestion that further prohibited grounds for discrimination, especially language, be included in the Human Rights Act 1993*

It is considered that New Zealand law does in fact ensure that the grounds for discrimination are effectively proscribed; in particular, language has been dealt with under complaints on the ground of race (below paras. 241-244).

*Sentence of Preventive Detention*

The indeterminate sentence of preventive detention attempts to strike a balance between the offender's rights and those of victims where the risk to the public is demonstrable and the potential harm to victims severe. It is sparingly used. Information is given on the principles underlying, and on the incidence of, this type of sentence (below paras. 107-125).

*Films, Videos and Publications Classification Act 1993*

"Objectionable material" is defined in Section 3 of the Films, Videos and Publications Classification Act 1993. Furthermore, the Court of Appeal has clarified the meaning of "objectionable material" in two recent judgements. In regard to Section 123 of the 1993 Act the Government felt that strict liability was the best way to prevent distribution of pornographic material since most hard-core pornography never enters the classification system (below paras. 178-183).

*No Prohibition of the Advocacy of Religious Hatred in the Human Rights Act*

The New Zealand Human Rights Commission has reported that there is no evidence of difficulties in this area, but is maintaining a watching brief (below para. 185).

*Maori Disadvantage in Health, Education and Employment and Low Proportion of Maori in Parliament, Public Office, etc.*

There have been some improvements, but much remains to be done. The Government has launched a new initiative the aim of which is to actively eliminate disparities, including those between the Maori, Pacific Island and Pakeha population (below paras. 292-293).

54. Other matters raised by the Committee (including the question of the New Zealand reservations to articles 10 and 22 and information on the new Electoral Act 1993, the Equal Employment Opportunity provisions, the activities of the Human Rights Commission, the prison reform, and the Waitangi Tribunal) will be dealt with in the body of this report, or by way of update at the time of consideration of the report by the Human Rights Committee.

## ARTICLE 1

## Right of self-determination

### Tokelau

55. As noted in New Zealand's Third Report, the islands of Tokelau remain as New Zealand's only non-self-governing territory in terms of Chapter XI of the Charter of the United Nations. Under a programme of constitutional devolution developed in discussions in 1992, Tokelau, with New Zealand support, is developing the institutions and patterns of self-government that will enable its people to make a valid choice, under an act of self-determination, concerning their future political status. This programme was reaffirmed in 1994, when Tokelau informed a United Nations visiting mission that it had under active consideration both the Constitution of a self-governing Tokelau and an act of self-determination. It also expressed a strong preference for a future status of free association with New Zealand.

**Draft Declaration on the Rights of Indigenous Peoples**

56. The New Zealand Government has been participating actively in the deliberations of the United Nations Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples. The New Zealand Government negotiating position on the question of self-determination, is attached as Annex D.

## ARTICLE 2

### Legislative and other measures to ensure all individuals enjoy the rights enshrined in the Covenant without discrimination on the grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status

### Effective remedies where a violation of any rights or freedoms has occurred

### Competency of judicial, administrative or legislative authorities

**Human Rights Commission**

57. The central role of the Human Rights Commission in safeguarding people against discrimination, has been described in previous reports. A full picture of the work of the Commission within the reporting period, is contained in its Annual Reports to Parliament (attached as Annex E). Some of the major aspects of this work include:

- the processing of complaints;
- the provision of education and training sessions to the public together with the publication of educational materials;
- the *Consistency 2000* project undertaken under Section 5 (1) of the Human Rights Act 1993 (see also below paragraphs. 60-67);
- the submission of comments on legislation that may affect human rights; and
- the provision of special reports to Government.

58. As explained in New Zealand's Third Report, New Zealanders who consider that their right not to be discriminated against has been infringed have the ability to complain to the Complaints Division of the Human Rights Commission. The Annual Reports of the Commission (attached as Annex E) describe this very active area of the Commission's work, including the nature of the settlements and remedies arrived in relation to particular complaints.

59. Of particular note, in its education and information role, has been the Commission's practice of preparing guidelines for the avoidance of acts and practices that may be inconsistent with the provisions of the Human Rights Act, the establishment of a sexual harassment prevention consultancy aimed at assisting employers with sexual harassment prevention

programmes. These efforts are accompanied by special measures like the recent sexual harassment prevention week which was designed to raise the public's awareness of sexual harassment through television, radio, magazines and newspapers, and a national training network. Furthermore, a special team within the Commission was established to provide education/outreach programmes for Maori.

**Review of Legislation for Consistency with the Human Rights Act**

60. New Zealand's Third Report described, in the context of article 2, the Human Rights Act 1993, the text of which was forwarded for the information of the Human Rights Committee. Further to paragraph 14 of that report, pursuant to Section 5 (1) (i)-(k) of the Act, the Human Rights Commission was engaged in an examination of all current New Zealand Acts, regulations, Government policies and administrative practices with a view to determining by 31 December 1998 whether they conflicted with the anti-discrimination provisions of the Human Rights Act or infringed the spirit or intention of the Act. This project was known as *Consistency 2000*.

61. Early in 1997 the Government became concerned about the resource implications of *Consistency 2000* and started to look at the options for modifying aspects of the project. In October 1997, the Government decided to revisit the *Consistency 2000* project in light of the significant resources committed to the project, and preliminary indications that many inconsistencies found were repetitive or minor in nature.

62. The Government introduced a Human Rights Amendment Bill to Parliament on 19 August 1998 that would have relieved the Human Rights Commission of its statutory duty to report on the *Consistency 2000* project; clarified the non-primacy of the Human Rights Act over other legislation; added new exceptions or clarifications to the Act for Government-related services in the areas of social welfare, health, and defence; preserved age-linked retirement benefits; and designated a Women's Commissioner. However, this bill failed to gain sufficient support in Parliament to progress beyond the introduction stage of the legislative process.

63. Accordingly, the Government decided not to progress that bill further and introduced a second bill, the Human Rights Amendment Bill (No. 2), which was enacted on 8 September 1999 to become the Human Rights Amendment Act 1999 (this and the unenacted Human Rights Amendment Bill 1998 are attached as Annex F). The Human Rights Amendment Act 1999, contains the following elements:

- The expiry date in respect of the Government's exemption from the new grounds in the Human Rights Act and the current status of the Act in relation to other legislation is extended from 31 December 1999 to 31 December 2001;

- The expiry date in respect of Section 126 B of the Social Security Act 1964 is extended from 31 December 1999 to 31 December 2001 - this provision exempts certain acts done in relation to the granting of a benefit or assistance from the application of the Human Rights Commission Act 1977 or the Human Rights Act 1993;

- The Minister of Justice is to report to Parliament on a six-monthly basis on progress in addressing significant areas of inconsistency between existing legislation and the Human Rights Act;

- The Human Rights Commission is empowered to comment on the Minister's report before it is presented to Parliament, with any such comment being included in the report; and

- Age-linked retirement benefits contained in employment contracts in force on 1 February 1999 will not be in breach of the Human Rights Act.

64. The primary purpose of the Human Rights Amendment Act 1999 is to preserve the Government's current position in relation to compliance with the Human Rights Act for a limited period in order to allow Parliament a reasonable period of time in which to consider the complex issues surrounding Government compliance with the Act.

65. In addition to the measures contained in the Human Rights Amendment Act 1999, the Government has undertaken to ensure that:

- All regulations made after 1 January 2000 are consistent with the Human Rights Act unless any inconsistency is specifically authorized in an Act of Parliament;

- All Government policies and practices are consistent with the Human Rights Act except in the areas where exemptions have been proposed in the original Human Rights Amendment Bill 1998; and

- The Human Rights Commission is adequately resourced to carry out its role under the Human Rights Amendment Act 1999.

66. The Human Rights Commission presented its *Consistency 2000* report to the Minister of Justice on 31 December 1998. Even though the full evaluation of all legislation, regulations, and policy and practices was not fully completed, the legislation, regulations, and policy and practices administered by six government departments (Department of Internal Affairs, Ministry of Research, Science and Technology, Department of Labour, Ministry of Cultural Affairs, Ministry of Transport, Ministry of Justice) were assessed. In these batches the Human Rights Commission did not find any serious violations of Part II of the Human Rights Act 1993. However, the Human Rights Commission identified some areas (for example, same-sex relationships, age of responsibility, retirement, family and dependents, language) which should be addressed systematically to avoid discrimination in that area. As part of the response to the report, the Government published a discussion paper on "Same-Sex Couples and the Law" which invited the public to make submission on various questions in regard to same-sex relationships.

67. In the middle of the year 2000 the Government undertook a ministerial re-evaluation of human rights protections in New Zealand. The results of that review have been released as a

discussion document for public comment and will be considered by the Government. Further information will be provided by way of update at the time of the Committee's consideration of this report, and also in detail in New Zealand's next periodic report.

**Judicial Decisions**

68. Within the reporting period, the decision in *Coburn v. Human Rights Commission* [1994] 3 NZLR 323 was of particular importance because it led to a change in the law through the passage of the Human Rights Amendment Act 1994. In this case the High Court ruled that the provision of spousal pensions, without providing equivalent benefits to pension fund members who are single, amounted to unlawful discrimination on the ground of marital status under the Human Rights Act 1993. The ruling was expressly limited to affect only those benefits derived from contributions made by a member on or after the date the Human Rights Act came into force.

69. The ruling posed difficulties for about 100 defined superannuation schemes providing pensions for surviving spouses of members, including the Government Superannuation Fund and the National Provident Fund. These schemes had in total about 150,000 members and 90,000 pensioners. It was estimated that the capital cost to non-governmental schemes of extending spousal benefits to all members would be between $200 and $300 million (plus withholding tax) and that there would be a similar cost to the Government Superannuation Fund. It was also expected that without legislative action the response to this ruling would be either a reduction of future benefits for existing members as a result of having to pay greater benefits from the same level of funding, a termination of spousal pensions altogether, or the termination of schemes.

70. Following consultation with the Human Rights Commission and the superannuation industry, the Amendment Act was passed providing that any person joining a scheme on or after 1 January 1996 must receive equal treatment, irrespective of marital status, in the provision of survivor's benefits. This limited the effect of the ruling in the *Coburn Case* to new members joining on or after 1 January 1996, thus affording trustees additional time to revise their schemes and trust deeds to ensure compliance with the Human Rights Act.

## ARTICLE 3

### Equal rights of men and women to the enjoyment of all civil and political rights

71. Developments in the equal rights of men and women to the enjoyment of all civil and political rights during the report period are comprehensively covered by New Zealand's combined Third and Fourth Report to the Committee on the Elimination of All Forms of Discrimination against Women submitted in February 1998 (CEDAW/C/NZL/3-4). The commitment to further the development in equal rights is also documented by a report and a Study Paper recently published by the Law Commission. The focus of its report, *Justice: The Experience of Maori Women* (NZLC R53, Wellington, 1999), was to assist those involved in New Zealand's justice institutions, particularly those who are employed by the State and on

whom the Crown depends in the performance of its Treaty obligations, to understand and respond better to the needs and values of Maori women. The Study Paper, *Women's Access to Legal Services* (NZLC SP1, Wellington, 1999), examines whether New Zealand women are treated properly by the legal system and following from that whether New Zealand citizens have such access to legal services and advice as to be able to secure access to justice. This study also contributed to a Gender Equity seminar attended by the judiciary in 1997. A more detailed description of these papers will be in New Zealand's next periodic report.

**Representation of Women in Parliament**

72. The representation of women in Parliament increased significantly after the first election under the Mixed Member Proportional Electoral System and remained stable in the latest election in 1999 (below para. 219).

**Equal Employment Opportunity for Women**

73. The Human Rights Committee commented, in response to New Zealand's Third Report, that it would appreciate receiving information on the Equal Employment Opportunity (EEO) provisions and their effect on women's entitlements to equal pay and equal employment opportunities. This information is now provided as follows.

74. The New Zealand Government is committed to a broad range of approaches to promote the principles of equal remuneration and EEO, and to increase the participation of women in the workplace and reduce occupational segregation. A summary of the legislation that affects the rights of women in employment follows. In addition, measures taken to address discrimination in employment and equal remuneration are also given in New Zealand's reports under the ILO Conventions on Discrimination (Employment and Occupation) 1958 (No. 111) for 1 July 1994 to 30 June 1995 and on Equal Remuneration 1951 (No. 100) for 1 July 1993 to 30 June 1996. For convenience, the situation is described below under headings concerning *Legislative Initiatives*, *Non-legislative Initiatives*, and the *Gender Pay Gap*.

*Legislative Initiatives*

75. Together with the Human Rights Act 1993 described in New Zealand's Third Report, the Employment Contracts Act 1991 (since October 2000 this Act has been substituted by the Employment Relations Act 2000 which will be analysed in New Zealand's next periodic report) and the Equal Pay Act 1972 provide protections against discrimination on the basis of gender in employment. Employees who believe that they have been discriminated against by reason of their gender can take a personal grievance against their employer under the Employment Contracts Act; they can make a complaint to the Labour Inspectorate of the Department of Labour under the Equal Pay Act; or they can make a complaint to the Human Rights Commission under the Human Rights Act. A variety of information materials explaining the procedures and remedies provided under the Acts is widely available.

76. As outlined in New Zealand's Third Report, the Employment Contracts Act 1991 requires all contracts of employment to include effective personal grievance procedures. Sex discrimination and sexual harassment are two of the grounds on which a personal grievance claim can be made. While, as a result of the choice made by complainants, the Human Rights Commission deals with most complaints of this nature, the personal grievance procedures under the 1991 Act are used as an alternative by some women.

77. It is unlawful under the Equal Pay Act for employers to refuse or omit to offer or afford employees the same terms of employment, conditions of work, fringe benefits and opportunities for training, promotion and transfer as are made available to other employees with the same or similar qualifications employed in the same or similar work, by reason of the gender of the employees. An employee can make a complaint to the Labour Inspectorate, which may be able to resolve the situation informally via direct contact with the employer involved, or through an action in the Employment Tribunal. Under the Act, the Employment Tribunal may, of its own motion or on the application of a Labour Inspector, examine the provisions of an instrument or proposed instrument of remuneration, and amend it to the extent necessary to meet the requirements of the Act. No equal pay complaints were received by the Labour Inspectorate in the period covered by this report.

78. The State Sector Act 1988 requires every government department to develop and publish an annual EEO plan. Government departments are required to summarize the EEO programmes for the year and include an account of the extent to which they were able to meet the plan, in their Annual Reports. The EEO team of the State Services Commission evaluates the programmes and their development. State-owned enterprises under the State Owned Enterprises Act 1986, and local authorities under the Local Government Amendment Act (No. 2) 1989 are also required to develop EEO plans.

79. The Parental Leave and Employment Protection Act 1987 helps employees to balance work and family commitments. It prescribes minimum entitlements to parental leave for both parents, and protects the rights of workers who take parental leave. By providing for up to 12 months' unpaid parental leave, this ensures that parents who take time off work to care for their family are able to return to their previous positions, allowing them to continue their careers.

*Non-Legislative Initiatives*

80. While the Government recognizes the need for strong legislative prohibitions on discrimination in employment, it also encourages the voluntary adoption of EEO principles and practices on the basis that encouraging people to voluntarily change their behaviour is likely to be more successful. In this respect a number of arrangements are in place such as the EEO Trust which educates and promotes to employers the benefits of EEO practices, acknowledges and recognizes good EEO employers, develops educational material that seeks to change attitudes towards EEO, coordinates existing EEO resources, commissions research, reviews and monitors existing and proposed research and disseminates research results. The Government makes funding available to the Trust.

81. By joining with employers to disseminate EEO resources and messages about fairness and equality through the EEO Trust, the Government is able to promote the requirements for equal remuneration directly to the companies which are required by law to practice it.

82. The EEO Contestable Fund was established at the same time as the EEO Trust in order to assist in improving employer practices at the workplace level. Funding is available for projects which encourage employers and employees to work together to make positive and practical changes to behaviour and attitudes in relation to EEO in the workplace, promote interest and commitment to EEO by private sector employers and create a resource which is capable of being used by others. From the Fund's inception in 1991 to the end of the reporting period, 38 projects have received funding; the projects include work and family strategies, opportunities for women in non-traditional occupations and the establishment of a sexual harassment network.

83. The Government also initiated a large number of programmes to address gender issues under the title of "Focus on Employment". These programmes arose out of an invitation by the Government for all parliamentary political parties to join in a multi-party process to develop a consensus on the creation of employment opportunities. From this process a Prime Ministerial Employment Task Force was created, consisting of representatives from the Government, the Council of Trade Unions, the New Zealand Employers Federation and employers, and community and educational groups. The goal of the Task Force was to ensure that all who want it have the opportunity to participate in paid work. The Task Force produced 120 proposals which were then forwarded to the Multi-Party Group represented by the Government and two opposition parliamentary parties. The Multi-Party Group made further comments and suggestions which were forwarded to the Government. From these recommendations, "Focus on Employment" was developed and implemented.

84. "Focus on Employment" was a key component of the Government's wider tax reform and social policy programme, which also included tax reductions and a family assistance package. The policies outlined in "Focus on Employment" consisted of opportunities, incentives and responsibilities to assist more New Zealanders to take advantage of the employment opportunities available. Many of these initiatives were intended to have benefits for women in the workforce by creating more opportunities for workers to balance careers and family life, and providing the skills needed to obtain high-paying jobs.

85. The New Zealand Employment Service ran a large number of programmes and seminars providing assistance to people seeking work. Women were eligible for a variety of specially targeted initiatives, for example programmes providing support for women who wish to return to the workforce after having children, or who wish to stop receiving the Domestic Purposes Benefit and return to the workforce. More information on these initiatives is provided in New Zealand's reports on the ILO Convention on Equal Remuneration (No. 100) and in the ILO Convention on Employment Policy (No. 122).

86. The Community Employment Group worked at a "micro" level, facilitating opportunities for employment through timely advice and the provision of local coordination of resources, ideas and expertise for local solutions to labour market disadvantage, including partial funding where appropriate. The Group did not operate programmes but assisted local projects designed to provide training and support to women seeking to re-enter the workforce. The Group has had a

long involvement with the Maori Women's Welfare League, and the offshoot Maori Women's Development Fund, on a range of projects for the benefit of unemployed Maori women. From July 1996 the Government allocated an additional $9.9 million to allow the Group to focus on those people suffering the highest and longest term unemployment including women, Maori, disadvantaged communities and Pacific Island people.

*The Gender Pay Gap*

87. As mentioned above, it is illegal to pay differential wages on the basis of gender. Data from New Zealand's Quarterly Employment Survey show that between 1993 and 1996 there has been a relatively constant gap between the average hourly earnings for males, compared with the average hourly earnings for females. Female earnings are only about 81 per cent of male earnings. However, research conducted by the Department of Labour, based on household responses about their weekly earnings and average hours worked, reveals that the gap between the earnings of women and the amount of men's earnings grew smaller over most of the 1984 to 1994 period, i.e. from 79 per cent in 1984 to 89 per cent in 1992, before falling slightly back to 86 per cent in 1994 (Sylvia Dixon, *Pay Inequality between Men and Women in New Zealand*, Department of Labour, Occasional Papers, Wellington, 2000, attached as Annex G).

88. Improvements in the average qualifications and work experience of women may have contributed to this reduction in the differential between male and female earnings. However, pay disparity results from a complex array of interrelated factors, only one of which may be deliberate discrimination. Other factors related to women's lower level of participation in the workforce, and higher concentration in specific industries and occupations, are also a key to understanding the full nature of the problem of gender-related earnings differentials. Further research into the interrelationships between worker characteristics and earnings is ongoing.

**Judicial Decisions**

89. The reporting period saw a number of employment law cases relating to discrimination and sexual harassment. A few examples of judicial decisions are given to illustrate the implementation of sexual harassment law and discrimination law in the area of employment.

90. In *Dryfhout v. New Zealand Guardian Trust Co. Ltd.* (1996) 3 HRNZ 572 the Employment Court granted an interim injunction requiring the employer to facilitate, without impediment or obstruction, a female employee's return to work after parental leave, on her proposed conditions. The proposed conditions related to an adjustment of the plaintiff's work hours to fit in with child-care responsibilities. The Court felt, inter alia, that there was a possibility that not allowing the plaintiff to adjust her working hours could amount to discrimination under the Human Rights Act 1993 on the ground of family status.

91. In two decisions involving sexual harassment in the workplace the Complaints Review Tribunal made use of its power under Section 88 of the Human Rights Act 1993 to grant damages for the humiliation, loss of dignity, and injury of feelings suffered by the complainant. In *Proceedings Commissioner v. H* (1996) 3 HRNZ 239 the female complainant had been touched in ways she did not like and had been the recipient of comments which made her uncomfortable and made her resign from her job. The Tribunal rewarded NZ$ 5,000 for the

emotional stress suffered. Damages of NZ$ 10,000 for humiliation, loss of dignity, and injury to feelings were awarded in the case of *Proceedings Commissioner v. Russell* (1997) 3 HRNZ 694. The female complainant attended a sports massage course run by the male defendant. During a practical massage assessment the defendant was completely naked and was stroking his penis. He then required her to give him a body scrub in the shower, during which he told her to wash his genital area. The complainant complied with his wishes fearing a failed assessment.

## ARTICLE 6

### The right to life

92. During its term on the United Nations Security Council in 1993 and 1994, New Zealand welcomed the opportunity to strengthen the international framework for the protection of human rights - and specifically of the right to life - in connection with the establishment by the Council of its Statutes creating war crimes tribunals to deal with serious violations of international humanitarian law in the former Yugoslavia, and then later in Rwanda, respectively. New Zealand played a prominent role in bringing about this new development in international humanitarian and judicial law, designed to achieve the trial and punishment at the international level of persons guilty of atrocities, including "ethnic cleansing" and genocide. International law has thus been moved, more decisively than before, beyond its traditional concern with the actions of States alone, to respond directly and coercively to the actions of individuals who are responsible for flouting international norms. In the course of giving effect to the existing Security Council decisions by means of the International War Crimes Tribunals Act 1995 passed by the New Zealand Parliament, supplementary power was taken by New Zealand to provide for any future tribunals that may be established by the Council in like circumstances of dire humanitarian need.

93. Consistent with its interest in this subject, New Zealand is also a long-standing supporter of moves towards the creation of a more generally empowered tribunal. New Zealand participated actively in the development of the Rome Statute of the International Criminal Court adopted by the relevant United Nations Diplomatic Conference on 17 July 1998, and has signed and ratified that Statute. On 1 October 2000 the International Crimes and International Criminal Court Act 2000 came into force. A detailed description of the Act will be provided in New Zealand's next periodic report to the Human Rights Committee.

## ARTICLE 7

### No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; or (without free consent) to medical or scientific experimentation

### Convention against Torture

94. New Zealand submitted its Second Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in February 1997 (attached as Annex H).

**Female Genital Mutilation**

95. An amendment to the Crimes Act 1961, which came into force on 1 January 1996, expressly made the traditional cultural practice of female genital mutilation an offence (see the Crimes Amendment Act 1995, attached as Annex I). Bona fide medical procedures to promote health were excepted, and the provision makes it clear that a person on whom the procedure is performed cannot be charged as a principal or party to an offence. Three supplementary offences were also enacted to protect children under 17 and adult women from falling victim to the practice while outside New Zealand. A breach of any of the Act's provisions attracts a maximum penalty of seven years' imprisonment.

96. Specific legislation prohibiting the practice was enacted as it was not certain whether, in all circumstances, the practice would amount to an offence under the previous provisions of the Crimes Act. A clear legislative statement was considered desirable. It was also seen as a means of expressing support for those who wish to resist the practice within their communities. (While there is no documented evidence that female genital mutilation is practised locally, in recent years New Zealand has received migrants from countries in which it is practised. Despite the difficulty of quantifying the population at risk here, there is likely to be a small number of women and girls living in New Zealand who have been subjected to genital mutilation, or are at risk of being subjected to it.)

**Police Complaints Authority**

97. The functions of the Police Complaints Authority have been discussed in the Initial Report to the Committee against Torture (CAT/12/Add.2), and in New Zealand's reply to the issues raised by the Human Rights Committee in relation to New Zealand's Third Report. A complete account of the recent activities of the Authority can be found in its Annual Reports covering the period 1994-1999 (attached as Annex J). The number of complaints received by the Authority from 1 July 1993 to 30 June 1994 was 1,607, of which 99 were not accepted. The most common types of complaints received related to use of physical force (361), attitude (259), failure to investigate (132), and practice and procedure (116).

98. The method of keeping statistics was changed in 1994 to record the actual number of individual complaints processed. So while the number of files opened during the period from 1 July 1994 to 30 June 1995 was 1,650 (an increase of 3 per cent from the previous year), the actual number of complaints received during this period was 2,620, of which 96 were not accepted or pursued. The most common types of complaints received related to attitude (447), use of physical force (409), failure to investigate (210), failure to notify (179), practice and procedure (124), and unjust prosecution (117).

99. There has been a steady increase in the number of complaints received since the Police Complaints Authority came into existence. This seems to reflect an increased willingness of the general public to lay complaints directly to the Authority rather than through the Police, Ombudsman or the registrars of the District Courts. This in turn may be attributable to a greater confidence in the impartiality of the Authority, which is independent of the Police service.

It may also reflect a greater awareness of the existence of the Authority which has made considerable efforts to bring its work to the attention of the public, including information on how to lay a complaint.

100. Although the Authority has power, pursuant to Section 17 (1) (a) of the Police Complaints Authority Act 1998, to investigate complaints itself, the structure and funding of the organization are such that it is inevitable that almost all investigations will be conducted using Police as investigators. The issue of the objectivity and independence of Police as investigators has arisen on several occasions and publicly during the review period (Police Complaints Authority's report for the year ended 30 June 1999, attached as Annex J, 29-32).

## ARTICLE 9

**Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention**

### Detention of Persons who Pose a Risk to Society

101. In 1994 the New Zealand Law Commission was asked to consider, with the purpose of protecting members of the public from substantial risk of harm:

- the relevant provisions in the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the Criminal Justice Act 1985, including the definition of mental disorder in the 1992 Act; and

- whether the Criminal Justice Act or any other Acts should be amended to confer a power to continue to detain a person beyond the time the person is, under the present law, entitled to be released.

102. The working of the 1992 Act referred to above has already been outlined in paragraphs 50-51 of New Zealand's Third Report under the Covenant. The Law Commission's inquiry was precipitated by the serious offending of two former psychiatric patients, both of whom had been special patients after having been found "under disability" (unfit to stand trial) under Section 108 of the Criminal Justice Act 1985. Attention was subsequently focused on the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the changes it had made to the previous law. Of particular interest was the information made available by the Minister of Health that some people who were considered dangerous had been released from secure care under the mental health system because it was considered that since the 1992 Act took effect they were no longer able to be detained.

103. The Law Commission later - in August 1994 - issued its report on *Community Safety: Mental Health and Criminal Justice Issues* (NZLC R30, Wellington 1994, attached as Annex B). It may be noted that provisions of the International Covenant on Civil and Political Rights - including article 9 - are cited by the Commission when summarizing the international obligations it took into account (see *Community Safety: Mental Health and Criminal Justice Issues* 21).

In general, the Law Commission concluded, as to the second term of reference above, that the criminal justice system already contained wide enough powers to protect the public from people convicted of sexual and other violent offences who are considered to be dangerous. The Law Commission suggested that new legislation concerning persons with intellectual disabilities who present a substantial risk of danger to others should be prepared. It was recommended that this legislation include criteria for compulsory treatment and regulate the management, education and care undertaken in the community and institutions which would apply to this group of people. During the period under review, proposed legislation was developed by the Ministry of Health, and an Intellectual Disability (Compulsory Care) Bill was introduced into Parliament in October 1999. The Select Committee Report on the Bill is due at the end of the year 2000.

104. In the more general context, in late 1995 the Government established an inquiry into the whole availability and delivery of mental health services in New Zealand, relating to acute and semi-acute mental disorder. The inquiry team reported in May 1996 (the Mason Report, attached as Annex K) and made a number of recommendations, including a recommendation that a new organization, in the form of an independent Mental Health Commission, be established.

105. In August 1996, the Mental Health Commission was established as a Ministerial Advisory Committee with the key role of ensuring that the Government's mental health strategy is implemented. A Mental Health Commission Bill, to establish the Commission as an independent statutory body, was introduced in August 1996, and was finally enacted on 27 March 1998.

106. Some of the issues concerning the management of people who, because of their mental disorder, pose a risk to society have been clarified as a result of the findings of Review Tribunals under the 1992 Act and court decisions that have occurred since that Act was introduced. In addition, the Law Commission's report referred to in paragraph 48 above emphasized that much depends, not only on legislation, but on developing the application, interpretation and understanding of the Act. With this in view, the Ministry of Health issued general *Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992* (attached as Annex L), to be reviewed and amended as significant changes to the Act, or its interpretation, occur. Furthermore, the Ministry of Health has recently issued *Guidelines* for specific officers under the 1992 Act, for example, *Guidelines for District Inspectors Appointed under the Mental Health (Compulsory Assessment and Treatment) Act 1992* and is currently preparing the *Guidelines for Medical Practitioners Using Sections 110 and 110A of the Mental Health (Compulsory Assessment and Treatment) Act 1992*.

**Indeterminate Sentence of Preventive Detention**

107. In considering New Zealand's Third Report, the Human Rights Committee expressed concern about Section 34 of the Criminal Justice Amendment Act 1993, which provides for a sentence of indeterminate detention for offenders convicted even once of a serious crime who are likely to reoffend in a similar manner. The concern at the imposition of such punishment related to articles 9 and 14 of the Covenant, dealing respectively with arbitrary arrest and detention, and the presumption of innocence.

*The Law*

108. The sentence of preventive detention has been part of New Zealand law for many years; it has its antecedents in the habitual offenders legislation dating back to 1906. Since its introduction the range of offenders to which it is applicable and other features of the statutory scheme have been varied by amending statutes. Until 1987, the sentence was restricted to repetitive sexual offenders. However, in 1987 this was extended to serious offences of violence and the age threshold was lowered from 25 years to 21 years. In 1993 the sentence was extended to first offenders convicted of sexual violation. The sentence is one of two indeterminate sentences that can be given, the other being life imprisonment. Preventive detention can be imposed only after the accused has been tried and convicted in the usual way. Only the High Court may impose a sentence of preventive detention. At trial the accused is presumed innocent until proven guilty of the offence charged. Once convicted of a qualifying offence, preventive detention is one sentencing option that is available in certain limited circumstances.

109. Preventive detention may be imposed on an offender who is not less than 21 years of age and who either:

- is convicted of sexual violation; or

- has been convicted of a specified offence at least once since attaining the age of 17 years, and is convicted of another specified offence committed after the first conviction. The two categories of "specified offence" comprise certain sexual offences committed against a child under 16 years and specified sexual and violent offences committed against any person.

110. "Specified offences" comprise, against any victim:

- sexual violation (by various means including rape);

- attempt to commit sexual violation;

- compelling indecent act with animal;

- attempted murder;

- wounding with intent;

- injuring with intent to cause grievous bodily harm;

- aggravated wounding or injury;

- throwing acid;

- attempts to commit an offence of compelling indecent act with animal;

- attempts to wound with intent to cause grievous bodily harm.

111. Where the victim is a child under the age of 16, offences of:

- incest;
- intercourse with girl under care of protection;
- intercourse with girl under 12;
- indecency with girl under 12;
- sexual intercourse or indecency with girl aged 12 to 16 years;
- indecency with boy under 12;
- indecency with boy aged 12 to 16;
- indecent assault on man or boy;
- anal intercourse.

112. Before the sentence of preventive detention can be imposed on an offender who is convicted of sexual violation but who does not have prior convictions for specified offences, the court must:

- first obtain a psychiatric report on the offender; and
- having regard to that report and any other relevant report, be satisfied that there is a substantial risk that the offender will commit a specified offence upon release.

113. The court must also be satisfied when imposing this sentence that "it is expedient for the protection of the public that the offender should be detained in custody for a substantial period". In relation to the phrase "is satisfied", the Court of Appeal in *R. v. White* [1988] 1 NZLR 264 concluded that proof beyond reasonable doubt was not required. Even if all the grounds are made out, however the Court retains a residual discretion about whether to impose the sentence in the particular case before it. It may be that other sentencing options are more appropriate.

114. The Court of Appeal considered the meaning of "expedient" in *R. v. Leitch* [1998] 1 NZLR 420 (attached as Annex M), and held that the word as used in the section sets a lower threshold than "necessary" and merely imposes a requirement that the sentence be "appropriate" for the protection of the public - that is, that it be suitable considering the circumstances of the case to detain the offender in custody for a substantial period.

115. The Court of Appeal stated that, in assessing whether a sentence of preventive detention is "expedient" or whether there is a "substantial risk" the Court should take into account such factors as (*R. v. Leitch* [1998] 1 NZLR 420, 429):

- The nature of the offending;

- Its gravity and timespan;
- The category of victims and the impact on them;
- The offender's response to previous rehabilitation efforts;
- The time which has elapsed since any relevant previous offending, and the steps taken to avoid reoffending;
- Acceptance of responsibility and remorse for the victims;
- Predilection or proclivity for offending, taking account of professional risk assessment; and
- The prognosis for the outcome of available rehabilitative treatment.

116. The fact that the offender is subject to parole for life following release from a sentence of preventive detention, and can therefore be recalled to prison at any time, is also a relevant factor in determining whether preventive detention is to be preferred to a lengthy finite sentence as a means of protecting the public.

117. However, even if the court determines on the basis of the assessment that the threshold of "expedience" or "substantial risk" is met, it is not required to impose a sentence of preventive detention; it must consider whether the protective purpose of preventive detention can reasonably be met by an available finite sentence of imprisonment.

118. If imposed, a sentence of preventive detention can be appealed to the Court of Appeal in the same way as any other sentence. The sentence carries the same minimum statutory non-parole period of 10 years as a sentence of life imprisonment. Amendments made in 1993 now enable the court to order that an offender must serve a longer non-parole period in exceptional circumstances. Once the offender becomes eligible for parole, the Parole Board then considers the case in accordance with certain statutory criteria (such as the risk of reoffending).

119. On release an offender will be subject to conditions imposed by the Parole Board. These conditions are to assist the offender's reintegration into society and ensure some control over the offender, which is considered to be in the public interest. An offender who has been released may be recalled in certain circumstances. The recall decision is made by the Parole Board, with the offender having a right of appeal to the High Court.

120. It is important to note that - as already remarked - the sentence can be imposed only after a person has been tried in the usual way and convicted, and that during the trial the person is presumed innocent and has all the usual means of challenging the prosecution case. If imposed, a sentence of preventive detention can be, and often is, appealed to the Court of Appeal. The Parole Board also has the power to release after the minimum non-parole period is served. The issue of detention is therefore reviewed regularly once a person becomes eligible for release.

121. Of the 35 appeals against preventive detention considered by the Court of Appeal between 1990 and 1998, 29 were dismissed and 6 allowed by replacing the indeterminate sentences with finite terms. In addition, in this period the Solicitor-General appealed on three occasions against the non-imposition of preventive detention and in each case the appeal has been allowed. The statistics show that more preventive detention sentences have been imposed in recent years. That is due in part to the expansion of the range of qualifying offences, to the marked increase in convictions for qualifying offending (e.g. rape from 66 in 1982 to 263 in 1994, and indecent assault from 249 to 1,179 in the same period) and to the extension of the sentence to first offenders committing certain sexual violation offences (*R. v. Leitch* [1998] 1 NZLR 420, 427).

122. The power to impose preventive detention upon first offenders convicted of sexual violation has been used sparingly. Previous convictions are the best predictor of risk, and it will always be difficult to show the existence of a substantial risk without such convictions.

*Judicial Decisions*

123. In *R. v. Hapi* [1995] 1 NZLR 257 the Court of Appeal upheld the sentence of preventive detention with a minimum non-parole period of 15 years. In this case the accused, a 26-year-old man, with an extensive criminal record, pleaded guilty to sexually violating and wounding with intent a 78-year-old widow. The accused when committing the crime had just recently been released from prison after a four-year sentence for, inter alia, sexual violation on a 10-year-old girl. The accused did not show any remorse and a psychiatric report stated that he was likely to reoffend in the future.

124. In the above-mentioned case of *R. v. Leitch* [1998] 1 NZLR 420 the accused pleaded guilty to nine counts of indecent assaults involving four male complainants aged 13 to 15. The appellant was a persistent predator. The victim impact statements showed the far-reaching effects on each youth and the traumatic effects on other family members. The accused had been convicted in 1988 on four similar charges involving two boys aged between 12 and 16. He also committed an indecent assault in 1990. The Court of Appeal quashed the sentence of preventive detention and imposed an eight year finite term based on a second psychiatric report which in contradiction to the first one predicted that the accused had a good chance of offending-free behaviour if he could enter an established sex offender treatment programme in prison.

125. The Government will continue to monitor closely the use of this sentence.

**Home Detention**

126. Under the Criminal Justice Amendment Act 1993, offenders released on parole may be subject to home detention (defined as "detention in an approved private residence"). One home detention scheme was established on a pilot basis in the Auckland region. The first inmate was released to home detention in March 1995. The pilot was evaluated over an 18 months' period in 1995-1996. During that period 37 inmates were released to home detention. When compared with the eligible prison population, property and drug offenders were over represented on the

programme and violent offenders under represented. Maori offenders were under represented on the programme, Pacific Islands offenders were over represented and New Zealand European offenders were in proportion with the eligible prison population.

127. The home detention period ranged from two months to nearly five months. The average and most common period was three months.

128. Since it was evaluated to be successful (see Alison Church, Stephen Dunstan *The Evaluation of the Home Detention Pilot Programme 1995-1997*, Ministry of Justice, Wellington 1997, attached as Annex N) the Criminal Justice Amendment Act 1999, which came into force on 1 October 1999, extended the scheme throughout the country. It made available as an option for offenders from the start of their prison sentence where leave to apply is granted by the court, and as an option for all other offenders from a date three months before the date on which they become eligible for parole. Before directing a release to home detention, the Parole Board must consider the nature of the offence, the likelihood of reoffending, the safety of the occupants of the residence to which the offender will be released, and the offender's welfare and likelihood that rehabilitation will be assisted by home detention. It must also have regard to submissions made by the victim; and for that purpose Section 11 Victims of Offences Act 1987 provides that victims of sexual violation or serious violence can request notification of the time and date of a hearing for release to home detention.

129. A release to home detention may be for any period up to 12 months but can be extended for a further 12 months if the offender consents.

**Children and Young Offenders**

130. In the context of article 9, it was indicated in paragraph 57 of New Zealand's Third Report that:

> Section 21 of the *Crimes Act* 1961 provides that no child under the age of 10 shall be convicted of an offence. Section 22 of the *Crimes Act* provides that no person shall be convicted of an offence committed by him or her between the ages of 10-13 unless at the time the offence was committed he or she knew that the conduct was "wrong or that it was contrary to law". However by virtue of the provisions of the *Children, Young Persons, and Their Families Act* 1989, children aged between 10 and 13 can only be prosecuted for the offences of murder and manslaughter.

131. This had previously been put more succinctly as follows in paragraph 29 of New Zealand's Initial Periodic Report under the Convention on the Rights of the Child:

> New Zealand law provides limits on the age at which criminal liability can be placed upon children. No person under 10 years of age can be convicted of an offence (Section 21 of the Crimes Act 1961). A child between the ages of 10 and 14 can only be prosecuted for murder, manslaughter, or a minor traffic offence and only if the child knew that the act or omission was wrong or that it was contrary to the law. (Section 22 of the Crimes Act 1961; and Section 272 of the Children, Young Persons, and Their Families Act 1989).

132. In its examination of the Third Report under the Covenant, the Human Rights Committee referred to the operation of the Family Group Conference system under the above 1989 Act, and was then further given information on its question:

> How many children and young persons are criminally prosecuted and how many are dealt with by "alternative means"?

133. It should now be added, by way of additional explanation, that under the Children, Young Persons, and Their Families Act 1989, the New Zealand Police must follow the principle that unless the public interest requires otherwise, criminal proceedings are not instituted against children or young persons if there is an alternative means of dealing with the matter. For the period under review, the following statistics display the results of applying this principle:

> Of the offences attributed to young persons in the year to June 1996, 10,798 were finalized by way of warning, 25,483 by youth aid action, 3,463 were referred by police for a family group conference, 3,081 were referred from court for a family group conference and 1,473 were finalized by way of a court conviction.

134. The above category of "young persons" is defined by the 1989 Act as those over the age of 14 years but under 17 years. An examination of crime statistics shows that there were no homicide apprehensions for the 10-13 age group in the year to 30 June 1996, and that it is reasonably safe to assume that most juvenile prosecutions for that year were for offenders in the 14-16 age group.

135. Another recent analysis focuses on the number of court appearances by young people (rather than the figure for prosecuted offences) since the Children, Young Persons, and Their Families Act was introduced. This indicates that court appearances by 14- to 16-year-olds dropped more than 50 per cent - from 8,193 in 1989 to 3,908 in 1996 (*Conviction and Sentencing of Offenders in New Zealand: 1987 to 1996*, Ministry of Justice, Wellington 1997, 99 et seq., attached as Annex O). In 1997, 4,111 cases involving young people came before the courts. This figure maintains a 50 per cent decrease in court appearances since 1989.

**Use of Article 9 for the Interpretation of "arbitrary" in Section 22 of the Bill of Rights Act**

136. As mentioned earlier in paragraph 45 the Court of Appeal in *Manga v. Attorney-General* (1999) 5 HRNZ 177, 185 referred to article 9 of the Covenant when interpreting the meaning of "arbitrary" in Section 22 of the Bill of Rights Act.

## ARTICLE 10

### Treatment of persons deprived of their liberty

**Contracting Out of Prison Management**

137. The Penal Institutions Amendment Act 1994 (attached as Annex P, also described in New Zealand's Third Report and in the resultant discussion) allows the contracting out of prison management and the escorting of prisoners and their supervision while at court. In 1998 tenders

were called to manage a remand prison, to be built in Auckland. Both public and private providers tendered for the management of this prison, and the tender was awarded to an Australian based company. A contract for prisoner escort and courtroom custodial services in the Auckland region was awarded to another private company and commenced on 1 October 1998. Section 4A (5) (b) and (c) of the Penal Institutions Act 1954 requires a contractor to comply with the requirements of the NZ Bill of Rights Act 1990 and the United Nations Standard Minimum Rules for the Treatment of Prisoners as if the institution was managed by the Department of Corrections. Similarly Section 36H (3) of the Penal Institutions Act 1954 requires a security contractor (in respect of a security contract) to comply with the NZ Bill of Rights Act 1990 and the United Nations Minimum Standard Rules as if it and its employees were employees of the Chief Executive of the Department of Corrections.

**Department of Corrections**

138. In 1995, as a result of restructuring of the Department of Justice, a new Department of Corrections was created. That Department, and its Chief Executive, now have responsibility for the day-to-day administration of prisons.

**Mixing of Juveniles and Adults in Prisons**

139. It will be recalled that New Zealand made a reservation to article 10 on the mixing of juveniles and adults in prisons. The comments, in that respect, made in New Zealand's Third Report (and related supplementary information) are still relevant, except that relevant functions of the Secretary for Justice are now vested in the Chief Executive of the Department of Corrections. It should be noted, however, that the latter Department has recently been undertaking work in conjunction with a range of Government agencies in regard to the treatment of prisoners under 20 years of age; and this project includes a review of where and how these offenders are housed in prisons. In October 1998 this work resulted in the issuance by the Government of a discussion paper "Getting Kids Out of Adult Prisons", on which public comment was invited (attached as Annex Q). The first youth unit opened in the grounds of Hawkes Bay Prison in October 1999. In 2000 Cabinet instructed departments to review New Zealand's reservation to the Convention on the Rights of the Child on age-mixing in prisons, in order to assess whether there are steps that might be taken towards withdrawing it. Officials are to report back to Cabinet by September 2001. If it were found that New Zealand was in a position to withdraw the reservation to the Convention on the Rights of the Child (this will be discussed in New Zealand's Second Report under the Convention, which will be lodged with the Committee on the Rights of the Child in December 2000), it may also be possible to withdraw the reservation to article 10 of the Covenant. Any further developments regarding the treatment of young persons in prisons will be reported to the Human Rights Committee in New Zealand's next report.

140. Attention is also drawn to the fact that information about the holding of children and young persons in facilities administered under the Children, Young Persons, and Their Families Act 1989 has been provided at paragraphs 10.5, 10.6 and 11.3 of New Zealand's Initial Report to

the Committee against Torture under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (see CAT/C/12/Add.2), and at paragraphs 11 and 14 of New Zealand's Second Periodic Report under the same Convention (see Annex H to the present report).

141. In connection with the requirement in article 10.1 that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", reference should be made to the information given in paragraphs 169-173 below concerning the Criminal Investigations (Blood Samples) Act 1995 (attached as Annex R). It will be seen that the Act contains specific provisions ensuring that any persons arrested and detained pursuant to Court order for the purpose of taking a blood sample in accordance with a compulsion order are, in effect, treated with humanity and respect for their dignity and privacy (compare, for example, Part IV of 1995 Act).

**Mangaroa Prison Inquiry**

142. The report on the Mangaroa Prison inquiry, referred to in paragraph 62 of New Zealand's Third Report, has been considered, and the details of the Government response are now set out in paragraphs 21 et seq. of New Zealand's Second Periodic Report under the Convention against Torture (see Annex H). Furthermore, a settlement has been reached in the form of compensation to the victims and a public apology by the Crown. The Crown has undertaken under the deeds of settlement to keep the amount of the settlement confidential.

## ARTICLE 12

### Liberty of movement and freedom to choose residence - no one shall be arbitrarily deprived of the right to enter his own country

**The Returning Resident's Visa**

143. There was a reference in New Zealand's Second Report to holders of a Returning Resident's Visa (RRV). Permanent residents and New Zealand citizens (such as dual nationals) who are not New Zealand passport holders and who wish to travel overseas obtain such a visa to enable them to re-enter New Zealand and resume residence.

144. Current Returning Resident's Visa policy (as of September 2000) provides that:

> Principal applicants may, upon application, be issued with a Returning Resident's Visa valid for an indefinite period if they:
>
> - are not subject to requirements under Section 18A of the Immigration Act 1987 (that provision allows the Minister of Immigration or the individual immigration officer to impose individual requirements upon an applicant under certain circumstances); or

- if the applicant has been subject to a Section 18A requirements, has met those requirements; and

- have held a residence permit at a time which was a minimum of two years before the date the Returning Resident's Visa application was lodged.

145. In addition, they have to fulfil the following requirements:

- held a residence permit for a total of 184 days or more in each of the two 12 months portions of the 24 months immediately preceding the visa application; or

- have held residence permits for a total of 41 days or more in each of the 12 months portions of the 24 months immediately preceding the visa application, and are assessed by the Inland Revenue Department as holding tax residence status for the two years preceding the visa application; or

- have been approved residence under the Business Investor category and have maintained their investment in New Zealand for two years, or have obtained residence under another category and have maintained an investment of NZS 1 million in New Zealand for two years; or

- have obtained residence under any category and have successfully established a business in New Zealand not less than 12 months ago which is trading successfully and benefiting New Zealand in some way; or

- have held a residence permit for a total of at least 41 days in the 12 months period immediately before lodging the visa application; and

- all members of the applicant's immediate family who were included in the residence application have resided in New Zealand for a total of at least 184 days in the two year period immediately before lodging the visa application; and

- the applicant owns and maintains a family home in New Zealand; or

- has been genuinely employed full time in New Zealand for a total of at least nine months in the two year period immediately before lodging the visa application.

146. Principal applicants may, upon application, be issued with a Returning Resident's Visa valid for a 12 months period if they:

- are not subject to requirements under Section 18A of the Immigration Act 1987 (that provision allows the Minister of Immigration or the individual immigration officer to impose individual requirements upon an applicant under certain circumstances); or

- if the applicant has been subject to a Section 18A requirements, has met those requirements; and

- have held a residence permit at a time which was a minimum of one year before the date the Returning Resident's Visa application was lodged.

147. In addition, they have to fulfil either of the following requirements:

- have held residence permits for a total of 184 days or more in at least one of the two 12 months portions of the 24 months immediately before lodging the visa application; or

- have held residence permits for a total of 41 days or more in each of the 12 months portions of the 24 months immediately preceding the visa application, and are assessed by the Inland Revenue Department as holding tax residence status for the two years preceding the visa application.

The outlined requirements apply to applicants who were granted residence after 30 October 1995. For applicants who were granted residence before 30 October 1995 a transitional policy is in place.

## ARTICLE 14

### All persons shall be equal before the courts and tribunals; right to a fair trial

**Undue Delay**

148. There has been judicial consideration of Section 25 (b) of the New Zealand Bill of Rights Act which provides that everyone charged with an offence has the "right to be tried without undue delay". An example is the judgement of the Court of Appeal in *Martin v. Tauranga District Court* [1995] 2 NZLR 419 (referred to above in para. 16) in which a 17 month delay from charge to trial date was held to amount to "undue delay". The Court's decision was strongly influenced by the fact that the delay had been materially increased by the actions of the Crown Prosecutor. The Court of Appeal held that a stay of proceedings was the appropriate remedy in *Martin*, while observing that it may sometimes be appropriate to refuse a stay and grant some other remedy such as an expedited trial, damages, declaration or bail and that a finding of undue delay does not necessarily deprive a court of jurisdiction to proceed to trial. The principles from *Martin* have been applied in subsequent cases.

## ARTICLE 17

**No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation**

**Developments in regard to Privacy Act 1993**

149. The operation of the Privacy Act 1993 was outlined in New Zealand's Third Report. The work of the Privacy Commissioner established under that legislation is described in his Annual Reports to Parliament (attached as Annex E). Some developments in these regards are noted below; and other matters relevant to the protection of privacy in New Zealand are mentioned.

*Privacy Codes*

150. One of the functions of the Privacy Commissioner is the issuing of codes of practice. A code of practice may modify the application of one or more of the information privacy principles or prescribe how the information privacy principles are to be applied or complied with. At the time of the last report, the first code of practice had been issued, namely the Health Information Privacy Code 1993 (Temporary).

151. Codes of practice currently in force as at the end of the present reporting period included:

- Health Information Privacy Code 1994 (replacing the temporary code);
- GCS Information Privacy Code 1994; and
- Superannuation Schemes Unique Identifier Code 1995.

152. The GCS Information Privacy Code 1994 provided for remedies in the context of the privatization of the last remaining government-owned computing service company. GCS Ltd. processed sensitive personal data on behalf of the Government, including law enforcement information held at the Wanganui Computer Centre. At the code's expiry three years later it was replaced by the EDS Information Privacy Code 1997 in similar terms.

153. The Superannuation Schemes Unique Identifier Code deals with the sharing of unique identifiers (commonly known as identity numbers) between agencies having related functions. The Code permitted the reassignment of unique identifiers which would otherwise be prohibited under the Act. Essentially, the Code allowed those agencies involved in the administration of workplace-based superannuation and benefit schemes to reassign unique identifiers already assigned to individual employees.

*Expiry of Transitional Provisions in the Privacy Act*

154. The most important legal development in the privacy area during the period was the expiry of the transitional provisions in the Privacy Act. Until 1 July 1996, only complaints about breaches of principles 5, 6, 7 and 12 (relating to security of, access to and correction of

information, and unique identifiers) or the breach of a code of practice could be considered by the Complaints Review Tribunal and, ultimately, the High Court. Complaints regarding breaches of the other information privacy principles could only be made to the Privacy Commissioner. From 1 July 1996, the full Tribunal remedies provided for in the Act are available for all breaches occurring on or after that date.

*Judicial Decisions relating to Privacy*

155. The reporting period saw a number of cases relating to privacy in general and the Privacy Act 1993 in particular. A few examples of judicial decisions are given to illustrate the evolving jurisprudence in the area of privacy.

156. The first Tribunal ruling under the Privacy Act within the reporting period concerned the right of access to one's own personal information held by an agency. In *Mitchell v. Police Commissioner* (1994) 1 HRNZ 403 the Complaints Review Tribunal ruled that an agency cannot refuse an individual's request for access to his or her personal information on the ground that the information "cannot be found", unless reasonable attempts to find the information have been made. The decision confirmed that any agency, on receiving a request from an individual to have access to personal information, will need to ensure that the request is processed with diligence, and a thorough inquiry to ascertain the existence or otherwise of the information sought will be necessary.

157. *Hobson v. Harding* (1995) 1 HRNZ 342, 347 was an important High Court decision during the reporting period which clarified that the Privacy Act 1993 and the Health Information Privacy Codes do not prevent claims at common law for breach of privacy. The Court held that the common law action for breach of privacy, still in its formative and developing stages, was not superseded. This case involved a company which was partially set up by a Regional Health Authority to administer claims made by medical practitioners for general medical services (GMS). The first defendant, an employee of the company, advised the plaintiff, a medical practitioner, about a routine audit of his GMS files under Section 22G of the Health Act 1956. The audit involved inspecting and copying records, including patients' files. Later a private detective interviewed some of the patients. The Court held that both the doctor's and the patients' privacy had been breached.

158. In *L v. N* (1997) 3 HRNZ 721, the Complaints Review Tribunal awarded $20,000 for humiliation, loss of dignity and injury to the plaintiff's feelings. This case is also significant because it confirmed that information need not be written or in documentary form to fall under the Privacy Act.

159. A further significant decision in the privacy area during the reporting period was *Television New Zealand v. R* [1996] 3 NZLR 393. In this case the Court of Appeal lifted a suppression order on evidence that had not been admitted in a high profile murder case. The Court noted that the case concerned "on the one hand, the principles of public and open justice and freedoms of expression and, on the other, the privacy and the dignity of victims of offences" (394 per Keith J) and discussed the relevant provisions of the Covenant and the Bill of Rights Act.

*Monitoring of Proposed Legislation with regard to Privacy Standards*

160. Section 13 (1) (o) of the Privacy Act 1993 is a general provision enabling the Privacy Commissioner to examine any proposed legislation (including subordinate legislation) which the Commissioner considers may affect the privacy of individuals, and to report to the responsible Minister on the results of that examination. Such reports are frequently submitted to the Minister of Justice, and if a Bill is before a Parliamentary Select Committee, the reports are normally also copied by the Minister to the Committee concerned. Typical Bills commented on during the period (both in 1995) were the Criminal Investigations (Blood Samples) Bill (taking of blood samples for DNA analysis from suspects, and establishment of a DNA profile databank, see below paras. 169-173), and the Courts and Criminal Procedure (Miscellaneous Provisions) Bill (publication of names of fines defaulters).

161. More specifically, Section 13 (1) (f) of the Privacy Act empowers the Privacy Commissioner to examine any proposed legislation which provides for the collection or disclosure of personal information for the purposes of "information matching" between public sector agencies and to report to the Minister of Justice on the result of the examination. Information matching (often known as "data matching") is a process of comparison of records to identify discrepancies which warrant further investigation and possible action against an individual. The legislation guides the Commissioner as to matters to have regard to when commenting on proposed information matching programmes. Only a few of these reports, such as the one given in 1995 on the Electoral Reform Bill (Information Matching of Electoral and Immigration Information) were made in the period under review. In addition, the Privacy Commissioner has a statutory obligation, arising from Section 105 of the Privacy Act, to report on each authorized information matching programme in operation in his Annual Report to the Minister of Justice.

*Review of Operation of the Privacy Act*

162. Section 26 of the Privacy Act requires the Privacy Commissioner to review the operation of the Act as soon as possible after it has been in force for three years (and then at intervals of not more than five years). The process for the first review started in 1995; and in 1996 the Commissioner consulted the chief executives of Government departments for their ideas on the review and their initial impressions of the Act's operation. In 1997 full public consultation was undertaken. The Commissioner's First Periodic Review was then submitted to the Minister of Justice in late 1998. Overall, the report supports the view that the Act is working well. This report, which has been laid before Parliament as required by the Act, will be discussed in more detail in New Zealand's next periodic report under the Covenant.

**Review of the New Zealand Security Intelligence Service Act 1969**

163. The working of the Privacy Act 1993, in relation to the power of interception or seizure of communications pursuant to warrants duly issued under its provisions, was described in paragraphs 210-211 of New Zealand's Initial Report under the Covenant. At the conclusion of New Zealand's written response to the Human Rights Committee's written questions regarding

article 17 in the context of New Zealand's Second Report, it was also indicated that, as to safeguards, the Commissioner of Security Appeals, established under the 1969 Act, could inquire into complaints against the Security Intelligence Service.

164. In 1996 the above legislation was revised and supplemented, principally in order to increase the level of superintendence and review. This revision specifically:

- established an oversight committee of Members of Parliament: the Intelligence and Security Committee. While not dissimilar, in exercising its functions, to a normal Parliamentary Select Committee set up under Standing Rules of Parliament, the new Committee is (uniquely) accorded an appropriate and permanent status by being constituted under its own statute - the Intelligence and Security Committee Act 1996. The Committee's composition, as required by the Act, includes senior Parliamentarians from both the Government and the Opposition.

- provided for the appointment of an Inspector-General of Intelligence and Security who must previously have been a High Court Judge, in place of the former Commissioner of Security Appeals (who had had to be a barrister or solicitor of not less than seven years' standing). This office was established by a new and separate enactment: the Inspector-General of Intelligence and Security Act 1996; and the new appointee is a recently retired High Court Judge of many years judicial experience. Amplified powers are given to the Inspector-General. The Inspector-General may not only, as previously, consider complaints from members of the public that they may in some way have been adversely affected by an action of the Security Intelligence Service, but may also on their own motion (but subject to the concurrence of the Minister in charge of the Service) inquire into any matter relating to compliance with the law of New Zealand by a security agency. Similarly, the Inspector-General may inquire where there was reason to believe that a New Zealander might have been adversely affected by an operation of a security agency.

165. An important substantive amendment made in 1996 to the 1969 Act itself, was to extend the definition of security (which principally defines the area of responsibility of the New Zealand Security Intelligence Service) to include New Zealand's international or economic well-being. In order to underpin the political neutrality of the Service, it was specially provided by the 1996 Amendment Act that it is not a function of the Service to further the interests of any political party. It was also affirmed that the Act does not limit the right of individuals or organizations engaged in lawful advocacy, protest or dissent, and that the exercise of that right shall not, of itself, justify the Service in instituting surveillance of any persons or entities or class thereof within New Zealand.

166. The provisions in the 1969 Act as to the power of interception or seizure of communications as set out in New Zealand's Initial Report were left substantially intact by the 1996 Amendment Act; but consistently with the general objectives of the 1996 review, the Annual Report required to be made to Parliament regarding the interception warrants issued for the purpose of detecting activities prejudicial to security must now state the average length of time those warrants were in force in the reporting period irrespective of whether the warrants were issued in that period or an earlier one. The previous provision had required that

information in respect only of warrants issued in the reporting period. In addition, with the passage of the 1996 legislation, safeguards as to the use of interception warrants were enhanced with explicit provision for the new Inspector-General to have power of oversight and review of the issue and execution of such warrants.

167. Outside the reporting period, the 1969 Act was further amended by two separate Amendment Acts passed in 1999 after full consideration by the Intelligence and Security Committee. The first Amendment Act conferred on officers of the New Zealand Security Intelligence Service (SIS), acting under interception warrants, the express powers necessary to give effect to those warrants. These powers include the power to enter places, and in appropriate cases, to install a device or equipment in a place or to remove material from the place. This measure had become necessary because of the decision of the New Zealand Court of Appeal in the case of *Choudry v. Attorney-General* [1999] 2 NZLR 584 that the 1969 Act did not give officers proceeding under an interception warrant those powers (as had previously been assumed as implicit in the Act).

168. The second Amendment Act (the New Zealand Security Intelligence Service Amendment Act (No. 2) 1999) was designed to deal with some wider issues raised in the course of various submissions made regarding the first measure. The second Act addresses concerns about the special powers of the SIS. It provides greater certainty as to when those powers may be exercised. It also provides safeguards against potential abuse. In particular:

- It limits the component of the definition of "security" that concerns New Zealand's international or economic well-being to foreign capabilities, intentions, or activities that impact on New Zealand's international or economic well-being and to foreign influenced activities that are clandestine, deceptive or threaten the safety of any person and impact adversely on New Zealand's international or economic well-being. This change is intended to give reassurance, for example, that people cannot be pursued by the SIS simply for having an economic view different from that of the Government. The latter point is already made more generally by the express provision in the Act, referred to in the last sentence of above paragraph 165;

- It requires a new class of domestic interception warrants (that is, those warrants that affect New Zealand citizens or permanent residents) to be issued jointly by the Minister in charge of the SIS and a Commissioner of Security Warrants, who will be a retired High Court Judge (instead of the Minister solely, as was provided for in the previous legislation): foreign interception warrants (i.e. those that affect foreign persons or entities) will continue to be issued by the Minister solely: the Inspector-General's power of oversight and review of the issue of all warrants is retained;

- It makes explicit and mandatory the practice whereby the Minister in charge of the SIS may not direct the SIS to put any person in New Zealand under surveillance;

- It requires the Director of the SIS to consult regularly with the Leader of the Opposition to keep him or her informed about security matters;

- It makes provision for an annual report on the activities of the Service to be tabled in Parliament which includes an expanded statement regarding domestic interception warrants, including now a general assessment of the importance of the warrants concerned.

**Passage of the Criminal Investigations (Blood Samples) Act 1995**

169. In the context of article 17 prescription against arbitrary or unlawful interference with an individual's privacy, mention should be made of the enactment of the Criminal Investigations (Blood Samples) Act 1995 (attached as Annex R), which entered into force on 12 August 1996. This Act had as its background a public and parliamentary concern to establish more adequate evidentiary means of dealing with the increasing incidence of violent and sexual crimes. Specifically, the Act was designed to take account of recent developments in the field of genetic fingerprinting, and to meet judicial concerns about the absence, previously, of legislative guidelines relating to the use of such techniques by the Police in criminal investigations.

170. The principal purpose and effect of the 1995 Act is to provide - in relation to indictable offences - a statutory and carefully regulated basis for the practice of obtaining blood samples from suspects with their consent, and of using these samples for the purpose of confirming or disproving such persons' involvement in the commission of the offence (see Sections 6-12 of the 1995 Act). In case of refusal to consent, provision is also made for the police to make application to a High Court Judge for an order requiring the suspect to give a blood sample. The Court may make such order if it is satisfied that, inter alia, there is good cause to suspect that the person concerned has committed one of the more serious indictable offences listed in Part A of the Schedule to the Act. Those offences include sexual violation, murder, manslaughter, infecting with disease, and robbery. Very detailed conditions governing the ordering and compulsory taking of samples are set out in Sections 13-24 and 45-63 of the Act. It will be seen from these provisions that, consistent with articles 10 and 17 of the Covenant, careful regard is paid to the dignity of the person affected, and that informed consent is the preferred option. In the rare case where a person required by a judicial order to provide a sample refuses to do so, a member of the police may, pursuant to the Act, use reasonable force to assist a medical practitioner to take a fingerprick sample, so that there is in such an event a minimum intensity of interference with the person. All compulsion order cases, including in particular any where force has had to be used, are to be reported annually to Parliament (Section 76). There is thus a considerable array of safeguards and scrutiny governing use of the relevant powers.

171. The second purpose and effect of the Act (taking account of the fact that many offenders in the area of serious sexual and violent crimes are recidivist offenders) is to allow a DNA databank to be maintained by or on behalf of the police, storing DNA profiles derived from blood samples taken pursuant to the Act. Pursuant to privacy considerations, the release of information on the databank is prohibited except for police criminal investigations, for advice to the person providing the sample, and for administration of the databank. The provisions regarding the DNA profile databank are set out mainly in Sections 25-44 of the Act. Under the Act, the databank may contain DNA profiles derived from blood samples taken from persons convicted of a serious offence (as listed in Parts A and B of the Schedule) in respect of which the samples were taken, or of a related offence (unless the conviction is subsequently quashed).

172. The databank may also contain any DNA profile derived from a blood sample taken from a person pursuant to Part III of the 1995 Act. A sample may be taken under that Part of the Act by consent (in respect of a person of or over 17 years of age) in accordance with Section 34 or by way of compulsion order made by a Judge (Section 40 of the 1995 Act) in respect of a specified serious offence.

173. The use made by the police of various powers accorded by the Act has been summarized for the first time, as required by Section 76 of the Act, in the New Zealand Police's Annual Report to Parliament for 1997/98 (see *Parliamentary Paper G6*, attached in Annex R).

**Other Developments**

174. During the reporting period the Domestic Violence Act 1995 was enacted. It is discussed in detail in this report in relation to article 23 (paras. 196-199 and also under art. 24, para. 206). One of the effects of the Act is to provide a right for individuals who have obtained a protection order under the Act to ask for details of their whereabouts to be held confidentially by agencies maintaining public registers, on the ground that the release of those details would jeopardize their safety or that of their family. There is also provision for complaint to the Privacy Commissioner if an agency fails to action a request or if the request is declined.

175. In connection with the right to privacy, reference should also be made to article 25 below for information on the right of individuals who fear for their safety to be placed on a confidential part of the electoral roll (para. 239).

176. The Copyright Act enacted in 1994 includes a new "moral right" to privacy in relation to certain domestically commissioned photographs or films. The person who commissions the photograph or film has, where copyright exists in the resulting work but it is owned by some other person, the right not to have copies of the work issued to the public, or shown in public, and not to have the work broadcast or included in a cable programme.

177. In a further development, the Attorney-General reported to the House of Representatives, in November 1995, under Section 7 of the New Zealand Bill of Rights Act, that the Disclosure of Political Donations and Gifts Bill, a private members bill, was inconsistent with the Bill of Rights Act. The Bill breached Section 21 of the Bill of Rights by allowing the Attorney-General and the Electoral Commission the power of entry and inspection to conduct random spot audits to ensure that every political party and each individual candidate had correctly declared all donations, gifts, payments or provision of goods and services in a yearly schedule. The Attorney-General was not satisfied that the infringement of that right could be treated as a reasonable limit on that right in terms of Section 5 of the Bill of Rights Act. The Bill was not proceeded with, although provision for the disclosure of political donations was subsequently made by way of a 1995 amendment to the Electoral Act 1993. This Amendment is discussed in more detail under article 25 below (below paras. 229-231).

## ARTICLE 19

### Everyone shall have the right to hold opinions without interference

**"Objectionable material"**

178. Following presentation of New Zealand's Third Report, the Human Rights Committee urged that consideration be given to amending the Films, Videos and Publications Classification Act 1993 so as to include a more specific definition of "objectionable material", or by removing criminal liability for possession without knowledge of or reasonable cause to believe in the objectionability of the material. The following commentary is now offered to the Committee.

179. Section 3 of the Act sets out the meaning of "objectionable" for the purposes of the Act. The standard for prohibition is that the publication "describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good". In the most recent decision concerning censorship legislation the Court of Appeal held that the words "matters such as" limited the censorable publications to those that can fairly be described as dealing with matters of the kind listed. In that regard the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude (*Living Word Distributors Ltd. v. Human Rights Action Group* (31 August 2000), unreported, Court of Appeal, CA 58/00, 15 para. [28]).

180. Certain types of material are deemed to be "objectionable" and therefore automatically prohibited. These are publications which promote or support the sexual exploitation of children, sexual violence, urolagnia and coprophilia, bestiality, and acts of torture or extreme violence. It has to be noted that all of the activities described in Section 3 are criminal activities under the Crimes Act 1961, except for urolagnia and coprophilia. In the already referred to *Moonen* decision (above para. 18) the Court of Appeal emphasized that the censors, when acting under this deeming provision, had to articulate what it was about the particular publication which promotes or supports the prohibited activity (*Moonen v. Film and Literature Board of Review* (1999) 5 HRNZ 224, 236, 237 para. [29], attached as Annex C). In determining whether to prohibit any other publication, the Classifications Office is to consider the degree and manner to which the publication depicts specified types of sexual and physical contact, degrades people, or promotes criminal activity. A number of other factors such as the dominant effect of the publication, its character and its intended audience, are to be employed in the classification process.

181. This approach, of specifying the criteria for classification, was a deliberate one. Previous experience had shown that there were dangers in being over-specific in this area. Attempts had been made in the past to formulate a comprehensive and precise definition of what is prohibited, and what is not, by way of rigid lists of prohibited subject-matter. This approach was set aside because one of the consequences was to prohibit publications on the basis of subject-matter alone with little regard to the character of the publication, its likely effect, and the context in

which the subject-matter was dealt with. The difficulties with such an approach included the problems of formulating an exhaustive definition, the loss of flexibility in applying "balancing" criteria, and undue restraint on the capacity of the law to develop with the passage of time. The formulation of the criteria in Section 3 took account of these difficulties. Nevertheless, when read as a whole, Section 3 represents a very detailed and focused set of guidelines.

182. Regarding criminal liability for possession, the Government decided to take a firm stand. Accordingly, it was decided to provide that there should be no general defence available to a person charged with possession of an objectionable publication, for example child pornography. It was necessary to include the possession of unclassified material which is or may be objectionable because most hard-core pornography never enters the classification system.

183. Notably, this is one of the instances referred to in paragraph 25 above where the Attorney-General's Section 7 report was challenged in submissions to the relevant Select Committee on the ground that there was in fact no breach of the Bill of Rights.

**Freedom of Artistic Expression**

184. The Arts Council of New Zealand Toi Aotearoa Act 1994 (below para. 288-291) adverts to the right to freedom of artistic expression. The Act states that one of the functions of the Council is "[t]o uphold and promote the rights of artists and the right of persons to freedom in the practice of the arts" (Section 7 (i) of the 1994 Act).

## ARTICLE 20

**Any propaganda for war shall be prohibited by law - any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law**

**Advocacy of Religious Hatred**

185. The Human Rights Committee expressed concern, in its comments on New Zealand's Third Report, that the Human Rights Act contained no prohibition of the advocacy of religious hatred. On inquiry made to it, the New Zealand Human Rights Commission has reported that there is no evidence to suggest that New Zealand is experiencing difficulties in this area. The Commission has not received any significant complaints of discrimination on the ground of religion. Issues of religion that have been investigated by the Commission tend to be related to the issue of accommodation of religious differences, rather than to overt discrimination on this ground. The Commission is not currently advocating any amendment to the Act; rather, it is maintaining a watching brief for the possible emergence of problems in this context.

## ARTICLE 22

**Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests**

### Trade Unions

186. The situation regarding the right to freedom of association was described in New Zealand's Third Report (paras. 111-115) and the legislation described in that report remained in place during the reporting period. However, on 2 October 2000 the new Employment Relations Act 2000 came into force which contains some considerable changes to the employment law and freedom of association in New Zealand (see also para. 194 below). A detailed analysis of the new Act will be provided in New Zealand's next periodic report to the Human Rights Committee. It may also be noted that the Commerce Act 1986 contains a saving clause exempting contracts and arrangements about terms and conditions of employment from its provisions prohibiting anti-competitive practices, and thereby protecting the right to bargain collectively.

187. Further information on the situation concerning freedom of association and trade union rights in general has also been provided in New Zealand's reporting on ILO Convention 87, the November 1993 and October 1994 responses of the New Zealand Government to the ILO Committee on Freedom of Association's interim and final reports in relation to the complaint by the New Zealand Council of Trade Unions on collective bargaining and freedom of association, and the ongoing information that the Government has supplied to the Freedom of Association Committee in response to requests to be kept informed of relevant changes in case law that are relevant to the complaint lodged with the ILO (discussed below para. 193-195).

188. There have been no statutory amendments during the reporting period. However, the case law has continued to develop. Under the Employment Contracts Act 1991, employers must recognize the representative authorized by employees for the purposes of negotiations or other matters involving their employment contract. As foreshadowed in New Zealand's Third Report, the Court of Appeal clearly confirmed that in practice this means that an employer who agrees to negotiate must do so with any authorized representative of the other party.

189. Consistent with worldwide trends, union membership in New Zealand has been declining for a number of years, from 603,118 members in May 1991 to 362,200 in December 1995. This local trend continued after the introduction of the Employment Contracts Act in May 1991, which repealed compulsory unionism. Union density (total union membership as a percentage of the total employed workforce) has also declined, from 46.6 per cent in May 1991 to 24.3 per cent in December 1995, which is again consistent with worldwide developments. The move reflects both the decline in union membership and the increased size of the labour force in New Zealand.

190. Union representation is strongest in larger collective contracts (covering 20 or more employees), with 84 per cent of such employees as at February 1996 being represented by a union.

**Rights to Associate Collectively**

191. The information provided under paragraphs 116 to 119 of New Zealand's Third Report were still current in the reporting period. There were no restrictions on the right to associate collectively. To elaborate on some of the information in relation to strikes and lockouts, these were unlawful when they were concerned with the issue of whether a collective contract will bind more than one employer. This provision is intended to protect the right of employers not to face strike action and economic loss due to the actions of other employers over whom they have no control, and not to be coerced into collective arrangements against their will. Industrial action was lawful when it relates to the content of a multi-employer collective contract.

192. Other than the notice requirements applying to certain listed essential industries, there were no special legal provisions relating to the right to strike by particular categories of employees. The armed forces were not subject to the rights and obligations set out in the Employment Contracts Act 1991. The Chief of the Defence Force has a statutory responsibility to determine conditions of employment for the armed forces, in consultation with the State Services Commission. The 1991 Act applied to sworn police officers with certain separate arrangements provided by the Police Act 1958. Bargaining rights were given to the police unions, the Police Association and the Police Officers Guild. Senior staff may be employed on individual employment contracts. There were some restrictions on what may be negotiated as of right, and the police have no right to strike, but have a right to final offer arbitration.

**Compliance with ILO Conventions 87 and 98**

193. It will be recalled that the ILO Committee on Freedom of Association issued a final report in November 1994 on a complaint by the New Zealand Council of Trade Unions that the Employment Contracts Act contravenes Conventions 87 and 98. In response to the recommendations of the ILO, which included keeping the ILO informed of relevant legal decisions, the Government has provided periodic reports to the ILO on the development of case law. In addition, in response to the ILO's recommendation that the Government initiate tripartite discussions, the New Zealand Employers Federation and the Council of Trade Unions, in response to an invitation from the Government, provided initial responses to the ILO concerning the consistency of the Employment Contracts Act with the ILO's principles on collective bargaining.

194. In October 2000 the Employment Contracts Act was replaced by the new Employment Relations Act 2000. One of the objectives of the new Act is "to promote observance in New Zealand of the principles underlying International Labour Organization Convention 87 on Freedom of Association, and Convention 98 on the Right to Organize and Bargain Collectively". The New Zealand Government maintains a policy of regularly considering the ratification of ILO Conventions, however, the Government's policy is also that it will only ratify such Conventions when legislation and practices fully comply with all their provisions. The Government has recently provided a copy of the Act to the ILO, seeking comments on the compatibility of the Act with Conventions 87 and 98. The Government intends to further consider the issue of the compatibility of the Act with Conventions 87 and 98, and will provide further information in subsequent reports.

195. Similar issues affect the Government's position on New Zealand's reservation to article 22 of the Covenant. Case law will continue to clarify New Zealand's position, but for the reasons given in New Zealand's Third Report (paras. 120, 121), the Government does not propose to withdraw this reservation at this time. Further consideration will be given to this reservation in light of the Government's consideration of the compatibility of the Employment Relations Act with Conventions 87 and 98.

## ARTICLE 23

### The family is the natural and fundamental group unit of society and is entitled to protection by society and the State

**Domestic Violence Act 1995**

196. As shown in detail in the Government Statement of Policy on this subject issued in June 1996 (attached as Annex S), family violence remains a major problem which affects the entire community and continues to generate significant social and economic costs in addition to undermining fundamental human rights including those to life, equality, liberty and security. The Domestic Violence Act 1995 (attached as Annex T) took effect on 1 July 1996 with the primary objective of providing greater protection for the victims of domestic violence. The Act provides for a single protection order that protects against a wide range of behaviour amounting to physical, sexual or psychological abuse. The range of people to whom the Act applies includes not only married and de facto spouses (as under the Domestic Protection Act 1982) but also same sex partners, family and household members and those in close personal relationships. The order involves certain statutory conditions, including conditions restricting the possession of firearms, and in addition, a court can impose special conditions to suit the circumstances of the particular case. A further key aspect of the legislation includes the provision of mandatory programmes for respondents to protection orders. The primary aim of these mandatory programmes is to stop or prevent domestic violence on the part of the respondent. Additionally, the legislation enables protected persons, including children, to request attendance at State-funded programmes directed at promoting their safety. The Act also strengthens the enforcement provisions, in particular by increasing the penalty for the offence of breach of a protection order.

197. By way of background it should be explained that while the subject of domestic violence had already been the subject of specific legislation in New Zealand (in the Domestic Protection Act 1982), increasing concern with the incidence of this and other such problems has led to the promulgation of the new measure. The 1995 legislation contains a considerable range of key changes improving the law for women. It also recognizes the need both for stronger measures to alleviate the effects of domestic violence where it does occur, and to send a clear message about the kinds of behaviour which are regarded as unacceptable in close relationships - in the hope that such behaviour can be prevented. The New Zealand Ministry of Justice has an ongoing role in monitoring the operation of the Act, and is currently conducting a series of comprehensive evaluations to assess whether the Act's objectives are being met.

198. The Domestic Violence Act 1995 also recognizes that abuse can occur not just in relationships between domestic partners but also in the wider family. This is of particular significance for Maori who traditionally live in wider family groupings. Regulations have been made under the Act which specify that as a condition of approval, programmes which are to be delivered to a client group that is primarily Maori must demonstrate knowledge and understanding of *tikanga Maori* (traditions), including relevant Maori values and concepts. Paragraph 5 of the then Government Statement of Policy (see Annex S) is also relevant.

199. The Ministry of Justice has recently published a study *Domestic Violence Act 1995: Process Evaluation* (Wellington 2000) which seeks to provide information on how well the object and aims of the Act are being achieved. Overwhelmingly, the people who were interviewed as key informants for the study, and those who responded to the surveys, considered the 1995 Act to be a sound piece of legislation that achieves its objectives. A detailed analysis of the study will be undertaken in New Zealand's next periodic report.

**Same Sex Marriages**

200. In November 1994 the High Court delivered a declaratory judgement which recognized the right of post-operative transsexuals to marry in New Zealand as a member of their psychological sex (*Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 603). However, the scope of this decision did not extend to homosexual unions. The Judge noted that "it was accepted before me that it is implicit in the Act [Marriage Act 1955] that marriage is the union of one man and one woman".

201. In February 1996 proceedings were filed in the High Court at Auckland on behalf of three lesbian couples seeking a declaratory judgement as to the right of persons of the same sex to legally marry pursuant to the Marriage Act (*Quilter v. Attorney-General* (1996) 3 HRNZ 1 (HC)). The statement of claim alleged that there was no legal impediment to the issue of a marriage licence to the plaintiffs, and relied on Sections 6 and 19 of the Bill of Rights Act (headed respectively "Interpretation consistent with Bill of Rights to be preferred", and "Freedom from discrimination") in support of the declaration. It should be noted that the 1955 Act does not explicitly define marriage.

202. The couples submitted that the traditional common law historical reasons for marriage being a union between a man and a woman do not actually address the question whether "marriage" includes same-sex marriages, and therefore cannot be seen as today determining the issue. Furthermore, if the common law view would be that "marriage" only included the union between partners of the opposite sex then the Marriage Act 1955 should be interpreted in accordance with Section 6 of the Bill of Rights Act so as to avoid discrimination on the grounds of sex and sexual orientation as referred to in Section 19 of the Bill of Rights Act 1990. Section 19 of the Bill of Rights Act refers to the grounds of discrimination as set out in the Human Rights Act. Section 21 of the Human Rights Act 1993 includes sexual orientation, which is defined to mean "a heterosexual, homosexual, lesbian or bisexual orientation" among the prohibited grounds of discrimination.

203. The High Court held that couples must be of the opposite sex in order to marry. It stated (*Quilter v. Attorney-General* (1996) 3 HRNZ 1, 28 (HC)):

> If Parliament considers marriages between same sex couples should be recognized and registered as such, then it must enact a provision or provisions which makes it quite clear that is what it intends ... It is a question of social policy and it is for Parliament therefore to make a decision on behalf of the New Zealand population, not for the New Zealand Court by strained interpretation, to create new social policy.

204. Outside the present reporting period, the tenor of the above judgement was, on appeal, upheld by the majority of the Court of Appeal (*Quilter v. Attorney-General* (1997) 4 HRNZ 170) (see above paras. 174-177), which concluded that the wording and scheme of the Marriage Act 1955 could not accommodate marriages between persons of the same sex. Three Judges stated that confining marriage to opposite sex couples was not discriminatory (177 per Richardson P., 179 per Gault J, 215 et seq. per Keith J.). One Judge held that it was discriminatory (188 et seq. per Thomas J.) and one Judge held that it was prima facie discriminatory but needed no final view (per Tipping J.). The case is currently the subject matter of a communication before the Human Rights Committee (*Joslin et al. v. New Zealand*, Comm. No. 902/99). Subsequently, in 1999 a discussion paper was released by the Ministry of Justice on *Same-Sex Couples and the Law*. This discusses a range of legal matters relevant to same-sex couples, including the issue of marriage, formal recognition of the relationship, and property rights. The details of the report which followed this paper, and recent legislative changes affecting same-sex couples, will be discussed in New Zealand's next periodic report under the Covenant.

## ARTICLE 24

### Protection of children

### Convention on the Rights of the Child

205. The New Zealand Government ratified the 1989 United Nations Convention on the Rights of the Child on 6 April 1993. The First Report by New Zealand, submitted in October 1995 (CRC/C/28/Add.3) and presented in January 1997, discusses in greater detail the various measures relating to the welfare of children (attached as Annex U). New Zealand's Second Periodic Report under the Convention will be submitted in December 2000.
New Zealand signed the Optional Protocols of the *Involvement of Children in Armed Conflict and Sale of Children, Child Prostitution and Child Pornography* at the Millennium Summit and is working towards ratification of these two instruments. New Zealand is also working towards the ratification of ILO Convention 182 concerning the worst forms of child labour.
Subsequently, an amendment to the Crimes Act 1961 has been proposed which makes it an offence to be a client of a prostitute who is under the age of 18 years carrying a maximum penalty of five years' imprisonment (Provision 5 of the Crimes Amendment Bill 2000). The Bill is currently being considered in Select Committee.

**Domestic Violence Act 1995**

206. The Domestic Violence Act 1995 referred to under article 23 (see paras. 169-172) provides that children will be able to request attendance at State-funded programmes aimed at promoting their safety. As part of the same legislative package, significant changes were also made to the Guardianship Act 1968 by means of the Guardianship Amendment Act 1995 (attached as Annex V). Where allegations of violence are made in custody and access proceedings the court is to determine, as soon as practicable, whether the allegations can be substantiated. If so, the violent parent is not to be given custody or unsupervised access unless that parent can satisfy the court that the child will be safe (see Section 4 of the 1995 Amendment Act setting out "Special Provisions Relating to Cases Involving Violence").

**Extraterritorial Sex Offences**

207. The Crimes Amendment Act 1995 (attached as Annex I) enhances the global protection of minors by creating an extraterritorial offence prohibiting sexual conduct by New Zealanders with children in other countries. The effect of the relevant provisions in this measure is to make New Zealand citizens and those ordinarily resident in New Zealand liable to prosecution under New Zealand law if they engage in sexual conduct with children under the age of 16 years while outside New Zealand. The approach of the legislation is to make the kind of conduct that amounts to an offence with a child if done in New Zealand, also an offence if done outside New Zealand. The same defences and procedural safeguards that would apply if the offence had been committed in New Zealand will also apply to the extraterritorial offence. Upon conviction for an offence under this provision, a person will be liable to the same maximum penalty as would apply if the person had been charged with a domestic offence and convicted under the relevant section of the Crimes Act 1961. The Attorney-General's consent must be obtained, however, before any prosecution for an extraterritorial sex offence can be brought.

208. The Crimes Amendment Act 1995 also contains a provision making it illegal in New Zealand to assist people to travel overseas for the purpose of having sex with children, or to promote child sex tours.

**Intercountry Adoption**

209. During the reporting period the Government approved in principle New Zealand's accession to the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. A relevant Bill, designed to implement the Convention in New Zealand law, was introduced into Parliament within the reporting period. The legislation was later passed in the form of the Adoption (Intercountry) Act 1997, and New Zealand has duly acceded to the Convention. The effect of the 1997 Act is now to meet the requirements of good intercountry adoption practice as set out in the Convention, which has, by the Act, been given the force of law in New Zealand.

210. The Law Commission published a report *Adoption and Its Alternatives: A Different Approach and a New Zealand Framework* (NZLC R65, Wellington 2000) which deals, inter alia, with intercountry adoption. It recommends the introduction of a Care of Children Act. This Act

would encompass all relevant provisions concerning adoption in various Acts, for example, the Adoption Act 1955, the Guardianship Act 1968, and the Children, Young Persons and Their Families Act 1989.

**Mandatory Reporting of Child Abuse**

211. The proposal for the introduction of mandatory reporting of child abuse by certain occupational groups, referred to in paragraph 125 of New Zealand's Third Report, was not passed by Parliament when amendments to the Children, Young Persons and Their Families Act 1989 were considered in 1994.

212. Instead, as an alternative to the mandatory reporting of child abuse, an Amendment Act of 1994 altered Section 7 of the Act, so as to place a specific duty on the Director-General of Social Welfare to:

- Promote, by education and publicity, among members of the public and professional and occupational groups, an awareness of matters relating to child abuse; and

- Develop and implement protocols on the reporting of child abuse with agencies and professional and occupational groups, and to monitor the effectiveness of such protocols.

213. Within the reporting period, substantial progress on implementing both of these new duties was made by the New Zealand Children and Young Persons Service which has responsibility for the care and protection of children and young persons under the Act. An Interagency Guide, *Breaking the Cycle: An Interagency Guide to Child Abuse*, to the definitions, signs and reporting of abuse was published in October 1995 (attached as Annex W. Also attached for interest, in the same Annex, is a related publication issued in 1996: *Breaking the Cycle: Interagency Protocols for Child Abuse Management*).

**Welfare of the Child**

214. The purpose of the Children, Young Persons, and Their Families Act 1989 was to reform the law relating to children and young persons who are in need of care or protection. A short Amendment to Section 6 of the Act (relating to the welfare and interests of the child or young person) was passed by Parliament in 1994 and came into effect in early January 1995. The Amendment resulted from a 1991 Ministerial review of the Act (referred to in paragraph 124 of the Third Report) which examined the implementation of the Act in practice. That review had concluded that the basic philosophy, objectives and principles of the Act were sound. However, previously the guiding principle was worded to indicate that the welfare and interests of the child or young person should be the deciding factor where a conflict of interest arose. The 1994 Amendment changed the wording in a reinforcing way, to make the interests of the child or young person the first and paramount consideration having regard to the principles set out in the Act.

**Child Support Act**

215. With the Human Rights Committee, there was a discussion in response to New Zealand's Third Report, relating to child support procedures under the Child Support Act 1991. Further information is provided as follows. The Act represented a new policy in assessing the maintenance obligations and entitlements of parents, and as such has had a significant impact. The guiding principle of the Act is to affirm the right of children to be maintained by their parents. Generally, liability is calculated according to a set formula based on the liable parent's taxable income, a living allowance based on current domestic arrangements, and the number of children for whom child support is payable.

216. In recognition of the Child Support Act as a significant social policy initiative, the Government instructed officials from interested departments to examine the operation of the Act in 1993. As a result, a major change to the Act was made in 1994. Until July 1994 only the Family Court could review the amount of child support payable. From July 1994 either parent can apply to the Inland Revenue Department for an administrative review of the amount payable. Applications are considered by independent review officers on the same grounds used by the courts. If either parent is unhappy with the decision of the independent review officer, he or she can apply to the court for a hearing.

217. The administrative review process was introduced because of the perceived social barriers that existed with regard to people applying to the courts. Since the new process was introduced in July 1994, 4,200 applications have been made to the Inland Revenue Department for a review, with 30 per cent of these being made by custodians. This compares with 2,087 applications made to the Family Court in the two years prior to July 1994, with an estimated 5 per cent of these being made by custodians.

218. Following the review conducted by officials, the Government commissioned an independent review of the Child Support Act in 1994. This review was led by former Family Court Judge Peter Trapski. The review report was presented to the Government in November 1994. Action to implement the administrative recommendations of that report was either undertaken or planned within this reporting period. The review, and the report on the Government's implementation of it, are attached as Annex X.

## ARTICLE 25

**Every citizen shall have the right to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections and to have access to public service in his country**

**Conduct of the MMP Elections**

219. Consequent upon the development of a new electoral system as described in the Third Report, the first election conducted under the Mixed Member Proportional Electoral System was held in October 1996. The new Parliament was more broadly representative of New Zealand

society than previous Parliaments. The representation of women increased from 21 per cent in 1993 to 30 per cent. The number of MPs of Maori and Pacific Island descent also increased. Before that election, Maori held 6 seats out of a total of 99, and after the election held 15 out of a total of 120. Three MPs were of Pacific Island descent and, for the first time, an MP of Chinese descent was elected. After the 1999 election Parliament diversified even more. New Zealand has the first transsexual MP in the world and an openly homosexual MP. There are now four MPs of Pacific Island descent whereas the numbers in regard to the representation of women and Maori MPs remained stable. The MP of Chinese descent was re-elected.

220. There was a period of negotiation after the 1996 election between parties represented in Parliament as to which would form a Government. A coalition of the New Zealand National Party and the New Zealand First Party was sworn into office as the Government in early December 1996. The 1999 election also did not produce a clear majority and another Coalition Government between the Labour Party and the Alliance was sworn in. This Government is a minority one.

**Citizens Initiated Referenda**

221. The Citizens Initiated Referenda Act 1993 (the CIR Act), which came into force on 1 February 1994, now provides (for the first time) a process for individuals and corporate bodies to initiate national referenda on any subject. While the results of such referenda are indicative only and not binding on the Government of the day, the new machinery is clearly a useful new instrument for ascertaining public opinion.

222. The CIR Act process has several stages. The promoter of the referendum submits a question to the Clerk of the House of Representatives. After a period of public consultation the Clerk is required to determine the precise wording of the question for the referendum and to approve the petition forms. Once approval is received, the promoter has 12 months to collect the required number of signatures which must be not less than 10 per cent of registered voters who call for the holding of a referendum on the issue in question.

223. It is the Clerk's responsibility to determine, by the application of a sampling method, whether the petition has been signed by the required number of signatures. Where the Clerk finds that the petition has been signed by less than 10 per cent of registered electors the petition is returned to the promoter who then has a further two months to gather sufficient signatures. If the petition has enough valid signatures, the Clerk certifies the petition correct and gives it to the Speaker of the House. The Speaker is then required to present the petition to the House and the Government is required to hold the referendum.

224. The Governor-General then has one month to set a date for the referendum. The referendum must take place within a year of the Speaker's presentation unless 75 per cent of all Members of Parliament vote to delay it. The House can only delay the referendum for up to two years. If the date for the referendum has been set but subsequently a general election is called, either the Governor-General by Order in Council or the House may reset the date to coincide with a general election.

225. A simple majority of those electors voting will determine the referendum's result; however, as indicated already, the result is not binding on the Government.

226. The first citizens' initiated referendum under the CIR Act was held on 2 December 1995. At the referendum voters were asked to vote either yes or no to the following question:

> Should the number of professional fire-fighters employed full-time in the New Zealand Fire Service be reduced below the number employed on 1 January 1995.

227. A total of 27 per cent of registered voters participated in the referendum, with 88 per cent of (valid) votes being cast against the proposal.

228. Following this referendum, the CIR Act was amended in 1995 (a copy of the 1993 Act as amended is attached as Annex Y). Most of the amendments were procedural in nature. The most significant amendment was the introduction of a procedure to enable the promoters of referenda to withdraw a petition. Promoters may withdraw a petition by written notice delivered to the Clerk any time before the issue of writs for the holding of the referendum, and the referendum will not be held. The Act contains offences of bribing or seeking to unduly influence a promoter to withdraw a petition.

**The Electoral Amendment Act (No. 2) 1995**

229. An important change to electoral law, introduced by the Electoral Amendment Act (No. 2) 1995, was the introduction of requirements for the disclosure of donations made to registered political parties (already referred to under article 17 above paragraph 150), and the introduction of a limit on registered political party election expenses.

230. The Amendment Act provides that the total election expenses of a registered political party listed on the party vote ballot paper in the three months preceding polling day, shall not exceed $1 million plus $20,000 for each constituency contested by that party. If the registered political party is not listed on the party vote ballot paper the party's election expenses shall not exceed $20,000 per constituency in the three months preceding polling day. Spending by electoral candidates on the exclusive promotion of the candidate is subject to an existing separate limit. This limit was raised in the Amendment Act to $20,000.

231. The Act also requires, as of 1 April 1996, that registered political parties disclose annually donations received at electorate and national levels. Electoral donations from any person must be disclosed if they exceed $1,000 (either alone or when aggregated with all other such donations made in the same year by the same person). Anonymous electorate donations of more than $1,000 must also be disclosed. A similar regime applies to national donations (donations received by the registered political party's national organization). All national donations in excess of $10,000 must be disclosed.

**Maori Electoral Option**

232. Under the previous (First Past the Post) electoral system, electors of Maori descent had the option of being registered on either the Maori electoral roll or the general electoral roll. If registered on the Maori roll, the elector was allocated to one of the four designated Maori electorates. The Electoral Act 1993 now provides for the number of specially designated Maori seats in Parliament to fluctuate according to the number of electors registered on the Maori roll. Under the Mixed Member Proportional (MMP) electoral system Maori electors continue to have the option of being registered on either the Maori electoral roll or the general electoral roll. The number of Maori seats will rise or fall depending on the ratio of persons identified as Maori who chose to be registered on the Maori electoral roll to persons identified as Maori on both the general and Maori electoral rolls. This calculation is done at the close of the regular Maori option period described below.

233. The Maori option is exercised by electors when they first enrol and then during a two month Maori option period which occurs every five years. During this Maori option period electors of Maori descent may change from one roll type to another.

234. A Maori option period occurred between 15 February and 14 April 1994. This was a special Maori option period additional to the regular five yearly Maori option period and was required in order to establish the number of Maori seats for the first MMP general election. At the end of that Maori option period the number on the Maori electoral roll had increased from 104,414 to 136,708. The number of Maori who chose to enrol on the general electoral roll decreased from 149,225 to 127,826. This resulted in an increase in the number of Maori seats from four to five.

235. The 1994 Maori option was - as to various aspects - the subject of proceedings before the Waitangi Tribunal, the High Court, and the Court of Appeal. In early February 1994 a claim relating to the adequacy of the funding provided to publicize the Maori option was lodged before the Waitangi Tribunal. The Tribunal recommended that further funding should be provided for a publicity campaign about the option (WAI 413, 10 February 1994). This recommendation was considered and rejected by Cabinet. In reaching its decision Cabinet took into account that in the 12 months preceding the 1994 Maori option a considerable amount of funding had already been provided to inform Maori about the electoral law reform and to promote Maori enrolment. It also took into account the fact that the Electoral Act 1993 required each registered elector recorded as being of Maori ancestry to be sent an individual Maori option card to advise them of the Maori option. Finally, Cabinet considered that it was for the Government to decide how much should be spent on the publicity campaign as part of its overall setting of priorities for Government spending.

236. At the close of the Maori option the National Maori Congress and others then sought judicial review of decisions made regarding the funding and conduct of the Maori option. Both the High Court (unreported, HC Wellington, CP 99/94, 4 October 1994, McGechan, J.) and the

Court of Appeal held that the Crown had taken reasonable steps to publicize the Maori option. However, the Court of Appeal observed that "what was done was far from perfect" (*Taiaroa v. Ministry of Justice* [1995] 1 NZLR 411, 418, attached as Annex Z).

237. The New Zealand Maori Congress sought leave to appeal the Court of Appeal decision to the Privy Council, but leave was denied in June 1995.

238. The Government recognized that it was especially important to promote awareness of the option to Maori, given that the number of Maori seats in Parliament is directly influenced by the number of electors registered on the Maori roll. Following an Electoral Law Select Committee inquiry, legislation was enacted to extend the option period from two to four months. This was designed to provide more time for option publicity, and enable Maori electors to make informed decisions as to which roll they wish to be registered on. Consultation with Maori was undertaken within the reporting period to ascertain how best to present the next option, scheduled to take place in 1997. The 1997 Maori electoral option was then held from late April to late August 1997. Its conduct was accompanied by a full publicity and communications campaign designed to inform Maori of their choice between the general and Maori electoral rolls, and the possible impact of that choice on the number of Maori seats in Parliament. As a result of this campaign, together with 1996 census data, the number of Maori seats in Parliament following the 1999 general election increased from five to six.

**Privacy Issues**

239. Section 115 of the Electoral Act 1993 refers to the right of individuals who fear for their safety to be placed on a confidential electoral roll so that their details are not publicly released. This is an important safeguard which enables individuals to participate as electors in circumstances where they would otherwise feel obliged to remain off the electoral roll. Examples would include a woman who has left the family home because of domestic violence and does not wish to be traced by a former partner (above paras. 147, 169). The electoral enrolment form now advises all individuals who are registering to vote of the right to ask to be placed on a confidential roll if they fear for their safety.

**Review of the Electoral Act**

240. The Electoral Act required the House of Representatives to appoint a Select Committee after 1 April 2000, to consider whether there should be changes to the provisions of this Act dealing with Maori representation and provisions that determine the division of general electorates, and whether in its view there should be a further referendum on changes to the electoral system and, if so, the nature of the proposals to be put to voters and the timing of such a referendum. The MMP Review Committee was established by Parliament on 4 April 2000, pursuant to Section 264 of the Electoral Act 1993. The Committee then called for submissions from the public on the terms of reference. Public submissions were heard in September and October 2000. The Committee is currently considering the public submissions and is required to report to Parliament by June 2002.

## ARTICLE 26

### All persons are equal before the law and entitled without any discrimination to the equal protection of the law

**Language Discrimination**

241. In its comments on New Zealand's Third Report, the Human Rights Committee expressed concern that the prohibited grounds of discrimination in the Human Rights Act 1993 did not include all the grounds in the Covenant and, in particular, that language was not specifically mentioned.

242. Article 26 is concerned with equal protection before the law and the prohibition of discrimination. The prohibited grounds of discrimination in this article (as in article 2 (1)) are in fact open ended: the protection is "against discrimination on any grounds such as race ...". Obviously this does not mean that all distinctions must be removed from the law. The Committee itself has noted that "not every differentiation of treatment will constitute discrimination, if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". (General comment 18 [thirty-sixth session, 9 November 1989] para. 13). The majority in *Quilter v. Attorney-General* (1997) 4 HRNZ 170 (CA) (above paras. 200-204) found that the differentiation between opposite sex couples and same-sex couples in regard to the possibility of obtaining a marriage licence was reasonable (211 et seq. per Keith, J., 178 per Gault, J.).

243. The principle contained in article 26 is a complex one, and each State party must take steps to ensure that the results intended are in fact achieved through its legal and other systems. In the opening statement made at the time of the presentation of New Zealand's First Report, the Committee was advised of the extensive review of New Zealand's law and practice that was undertaken prior to ratification of the Covenant to ensure compliance with the obligations about to be accepted. Amongst other things, that review led to the Human Rights Commission Act 1977. Since then, as noted in the Third Report and in paragraph 5 of the present report, the provisions of that legislation were expanded in the Human Rights Act 1993. In this legislation, to provide better protection of human rights in New Zealand in accordance with the Covenant, and taking account of the legal and social context in New Zealand, prohibited grounds of discrimination were included which are not contained in the open-ended list, of Covenant article 26, for example, employment status, disability, age, marital status, and family status. It should also be noted, that like many other countries, New Zealand has not chosen to implement all the Covenant rights in one enactment of a specific type or status. This is clear from the fact that Section 28 of the Bill of Rights Act expressly declares that "An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part."

244. With regard to the Committee's particular concern that language is not specifically mentioned as a prohibited ground of discrimination in the Human Rights Act 1993, the Committee's attention is drawn to the Annual Report of the Race Relations Conciliator for the year ended 30 June 1995 (see Annex E, 106). That document refers to the fact that complaints of discrimination on the ground of race have been upheld where an employer has refused to allow any language other than English in the workplace.

## ARTICLE 27

**In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language**

### Maori

*Progress on Maori Claims*

245. At the time of the presentation of New Zealand's Third Report, there was considerable interest by and discussion with the Human Rights Committee about Treaty of Waitangi claims negotiations with Maori, including time-frames and the "Fiscal (Settlement) Envelope" in particular.

246. After extensive consultations, and following the General Election in October 1996, and as a result of provision made in the Coalition Agreement made in December 1996 between the New Zealand National Party and the New Zealand First Party on assuming Government (see above paragraph 220), the Government dropped the Fiscal (Settlement) Envelope as such, on the basis that:

- there is respect for the settlements already effected, which could not be re-opened;
- the Crown will endeavour to settle claims on their merits, using the settlements already effected as benchmarks; and
- settlements are fiscally responsible.

247. In the same Coalition Agreement the Government also affirmed the Treaty of Waitangi as fundamental to the relationship between the Crown and Maori, and expressed its commitment to working with Maori to achieve full and active participation in New Zealand society. The Agreement also included, among its Fundamental Principles of Government, a commitment:

> To continue to settle as expeditiously as possible, in a spirit of goodwill and integrity, outstanding Maori claims and grievances, having regard to the nature of Treaty settlements already made and to respect the spirit and letter of the Treaty of Waitangi as a founding document in New Zealand.

248. As to procedures for settling historical grievances, these remain as outlined in New Zealand's Third Report, but it can be added that under the Minister in Charge of Treaty of Waitangi Negotiations, a special Office of Treaty Settlements has been established as from 1 January 1995 in order to give better focus to government objectives to resolve historical Treaty of Waitangi claims.

249. Within the present reporting period there were important developments in the process of settling claims relating to historical grievances. In 1995 a settlement worth NZ$ 170 million in land and monetary compensation was negotiated with the Waikato *iwi* (tribe) of the North Island of New Zealand for its claim concerning land confiscated in the nineteenth century. In 1996, a Heads of Agreement was reached with the Ngai Tahu *iwi* of the South Island in settlement of its extensive claim. A Deed of Settlement was agreed with Ngai Tahu in late 1997 with a monetary value of NZ$ 170 million and included a Crown apology and instruments to recognize Ngai Tahu's special interests in particular sites and species (summaries of these major and complex settlements are contained in briefing materials issued at the time by the Office of the Minister in Charge of Treaty of Waitangi Negotiations; attached as Annex AA). In each case, the negotiated settlement was ratified by the respective *iwi*, and has been brought into effect through the enactment of settlement legislation by the New Zealand Parliament.

250. In 1998 progress continued to be made toward the settlement of the many outstanding historical Treaty claims in the North Island. In particular, a settlement with a monetary value of NZ$ 5 million was agreed with the Ngati Turangitukua *hapu* (sub-tribe) and a Heads of Agreement was agreed with Ngati Awa *iwi*.

251. The settlement of two major claims and several smaller ones has clearly demonstrated to all New Zealanders, Maori and non-Maori alike, that the settlement process, although controversial and time-consuming, is working and justifies the commitment of successive governments. As to specific financial results, the Minister in Charge of Treaty of Waitangi Negotiations reported to Parliament that as at mid-1997, the Crown had expended NZ$ 392.13 million from Vote: Treaty Negotiations on Treaty Settlements with Maori. By February 1999 this figure had increased to NZ$ 522.98 million.

252. The resolution of historical grievances, which has been given great impetus by the work of the Waitangi Tribunal, is a necessary but not sufficient aspect of the evolution of the relationship between Maori and the Crown, and between Maori and non-Maori in New Zealand society. Attention also has to be given to the nature of the ongoing relationship and the importance for the future that it is soundly based on dialogue, negotiation and cooperation.

253. The evolution of this relationship is a lengthy, complex and many-faceted process which involves the social, cultural and political life of New Zealand. As shown in the Annual Reports of the Office of the Race Relations Conciliator (attached as Annex E), there are many difficulties along the way, and there is a need for creative thinking to develop measures which embody principles of fairness, cooperation and good faith. Although, as the above reports indicate, the complexities are not necessarily understood, there is a developing appreciation in the community at large of the importance of building relationships of confidence and trust between Maori, the

Government and all other New Zealanders. For a brief assessment of "The Climate of Race Relations in New Zealand" during the period under review, reference may conveniently be made to an article with that title published in the New Zealand Official Yearbook 1997 (attached as Annex BB). This article summarizes the statistics of complaints made to the Race Relations Conciliator under the Human Rights Act 1993, and discusses other aspects of the contemporary scene. Another assessment is provided in the Annual Report of the Office of the Race Relations Conciliator for the year ending 30 June 1997 (attached as Annex E, 9).

254. Some other developments within the reporting period are as follows:

*Political Representation and Participation*

255. On a domestic basis, as an aspect of good governance and in recognition of Treaty of Waitangi duties, the Government has indicated a willingness in appropriate circumstances to discuss with the Maori people of New Zealand proposals for new ways for Maori to be heard or to contribute more directly and influentially to public policy, or to increase direct management of Maori outcomes by Maori within New Zealand's existing constitutional framework. Information on some of the measures being taken within the period under review is given below, and under article 25 (above paras. 232-238).

256. One of the issues raised by the Committee in reply to New Zealand's Third Report concerned the numbers of Maori in Parliament and high-level positions in the civil service.

257. Before the first MMP election in October 1996 Maori held 6 seats in the New Zealand House of Representatives, out of a total of 99 seats. After the 1996 general election, the number of Maori in Parliament increased to 15 out of a total of 120. This is broadly proportional to the ratio of Maori to non-Maori in the national population. In the 1999 election this result was repeated.

258. At a regional level efforts have been made to involve *iwi* in local government.

259. Discussions were held by the State Services Commission regarding the number of Maori holding high-level positions in the State sector with a view to identifying appropriate action to increase this number.

*Education*

260. The Government continues to seek to eliminate the disparity between Maori and non-Maori in participation and achievement in the education system. Within the reporting period an education strategy for Maori was being developed to examine existing policies and develop initiatives to improve educational outcomes for Maori.

261. *Kohanga reo* (which are early childhood centres offering programmes based on total immersion in Maori language, culture and values) accounted for almost half of the Maori children enrolled in early childhood education in 1995. Enrolments in *kohanga reo* have

steadily grown, with an increase of 41 per cent between 1990 and 1995. Enrolments rose from 10,108 in 1990 to 14,263 in 1995. Within the reporting period there were 738 licensed and 36 unlicensed *kohanga reo* in New Zealand. The number of *kohanga reo* fell from 819 in 1994 due to some centres amalgamating, others closing and others realigning themselves as early childhood immersion Maori centres. However, the number of children in *kohanga reo* rose from 13,543 in 1994 to 14,263 in 1995.

262. Within the primary school system there were 43 *kura kaupapa* Maori (State schools where the principal language of instruction is Maori and the total curriculum is based on Maori values, principles and practices) as at 1 January 1996. Four of these *kura* were official composite (primary and secondary) schools, in that they were able to educate children from year 1 to year 13 (5 year olds to 17/18 year olds). *Kura kaupapa* pupils account for approximately 3 per cent of Maori children in the education system.

263. Maori medium education (where Maori is the exclusive language of instruction and communication for between 30 per cent to 100 per cent of the total teaching time, with a further level below 30 per cent for those with ongoing Maori language programmes that are likely to lead to higher levels in the future) has increased annually since 1990. There were 15 per cent more students enrolled in 1995 than the previous year, with the greatest growth (36 per cent) occurring in programmes with less than 30 per cent immersion. In 1995, 444 schools offered Maori medium education.

264. Progress was made on a Maori Language Strategic Plan to provide a basis for improving Maori language use and understanding in contexts other than the school system.

*Health*

265. The Human Rights Committee expressed some concerns about Maori health in the issues raised in relation to New Zealand's Third Report. Although there have been improvements in the health status of Maori, they continue to lag behind non-Maori in most indicators. Research shows that Maori face additional barriers in access to health services. This is in part owing to lower incomes, and to the geographical isolation of many Maori communities, and in some cases it may be because services are not being sufficiently responsive to Maori needs.

266. At the same time, health has been identified as an area where Maori can have increased control over their own affairs. This has been made possible by the restructuring of the health system in recent years, which has seen the roles of funder, purchaser and provided separated. The devolution of service provision has given Maori the opportunity to develop services that are more responsive to their needs and which, more effectively, address disparities. At the close of this reporting period there were more than 100 Maori health provider organizations.

267. Government initiatives in this area included the establishment of a Maori Health Group within the Ministry of Health. This group provides strategic policy advice to the Government, and ensures that the Ministry of Health meets its obligations under the Treaty of Waitangi to improve Maori health.

*Social Services*

268. With reference to the focus on Maori developing programmes for Maori, the Department of Social Welfare's strategic document "Te Punga" (Wellington 1990), is the Department's documented commitment to bi-cultural practice. It requires that *iwi* (tribal) affiliations are recorded for all Maori clients in order to best plan *iwi*-based services for Maori. The first *iwi* Social Services contract was established in 1995. A challenge to the tribal basis upon which such contracts are awarded was heard by the Waitangi Tribunal during the reporting period. The Tribunal has, since the reporting period, found substantially in favour of the position advocated by the claimant group (an urban-based, non-tribal Auckland charitable trust), that the government should recognize non-tribal groups as well as those linked by kinship ties, as having the right to deliver social services to Maori (*Te Whanau O Waipareira* Report, WAI 414, 10 June 1998).

*Employment*

269. Access to employment is another issue that the Committee highlighted following the presentation of the Third Report. The unemployment rate is significantly higher for Maori than for non-Maori. The Government responded to this disparity through a range of employment projects which are aimed at Maori specifically. Of particular interest is the Maori Labour Market Strategy. This strategy aims to improve Maori employment outcomes through a combination of initiatives in the employment and education areas, and involves the expenditure of NZ$ 19 million on Maori employment initiatives over the following three years.

*Broadcasting*

270. In 1993 a Maori Broadcasting Funding agency *(Te Reo Whakapuaki Irirangi, Te Mangai Paho)* was set up to contribute to the resolution of a legal dispute concerning the ownership of broadcasting assets. Government approved funding for *Te Mangai Paho* was $3 million for 1993/94, $5 million for 1994/95 and a further $5 million was approved for 1995/96. Funding is provided for the promotion and protection of the Maori language through the medium of broadcasting. *Te Mangai Paho* also receives 13.5 per cent of the broadcasting fee, which is approximately $13 million.

*Te Reo (Maori Language)*

271. To celebrate the first year of the International Decade of the World's Indigenous Peoples, 1995 was declared *"Te Tau o Reo Maori:* The Year of Maori Language". As part of its commitment to *Te Reo Maori*, the Government allocated $500,000 to the Maori Language Commission to organize events and promotional projects.

272. Celebration of the place of Maori language in New Zealand society in this manner facilitated an increase in awareness, status, knowledge and use of the language among the Maori population and throughout wider New Zealand.

273. A wide range of projects was undertaken, ranging from small community-based language learning schools and other community-based language use programmes, to national media campaigns appearing on mainstream television services. Significant new sources of funding for language initiatives became available by sponsorship from the business sector, including firms such as Carter Holt Harvey Limited, Electricorp of New Zealand Limited and Television New Zealand Limited, which were three of New Zealand's largest and most well known businesses. A community fund of $1 million was also established by the New Zealand Lottery Grants Board for distribution to community groups for small community-based language projects. This fund helped to increase the use of the language in the communities in which it was distributed, and assisted in the creation of additional language resources in these communities.

274. The Government also funded a National Maori Language Survey which was undertaken during 1995 to provide baseline information about the current state of the Maori language in New Zealand. The findings of the Survey (which were published recently) provide empirical evidence enabling the development of strategic planning for the revitalization of the Maori language in the public and private sectors, enhancement of liaison with and amongst Maori communities about the revitalization process, and the promotion of internal departmental and public policies aimed at meeting more closely the linguistic needs of the Maori speaking community of New Zealand.

275. Since the close of the reporting period, and in response to the results of the Survey, the Government has undertaken to develop a Maori Language Strategy. This is based on an acknowledgement that the Crown and Maori are under a duty derived from the Treaty of Waitangi to take all reasonable steps to actively foster the survival of Maori as a living language. The Maori Language Strategy embodies five objectives in the areas of education, broadcasting, public sector activities, language corpus development, and monitoring and evaluation mechanisms.

276. The National Census of the population of New Zealand, undertaken every five years by Statistics New Zealand, was conducted in March 1996. It included, for the first time, a question on language. The Census forms were also produced in bilingual format allowing responses to be provided in either the English or the Maori language.

*Fishing Rights*

277. In the discussion with the Committee relating to New Zealand's Third Report, it was noted that an historic settlement of Maori fishing claims had been negotiated and effected by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It provides Maori with a major ownership stake in the commercial fishing industry, and control over fishing quota through a joint venture company. The Treaty of Waitangi Fisheries Commission was allocated $174 million in quota and cash to be used in the implementation of the settlement.

278. Section 10 of the Act provided that customary fishing rights would continue to place Treaty obligations on the Crown; and within the reporting period regulations to recognize Maori custom were being developed in negotiation with Maori. Two sets of statutory regulations were

then passed under the Fisheries Act. The Fisheries (South Island Customary Fishing) Regulations 1998 (SR 1998/72) (attached as Annex CC) came into force on 24 April 1998, covering the South Island of New Zealand. These were followed later by the Fisheries (Kaimoana Customary Fishing) Regulations 1998 (SR 1998/434) (attached as Annex CC) which came into force from 1 February 1999, applying to all New Zealand fisheries waters except the South Island.

279. As noted in paragraph 10 of New Zealand's Third Report, a complaint was lodged with the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, challenging the validity of the fisheries settlement. Central to the complaint was the argument that Maori negotiators did not have an adequate mandate to enter into an arrangement with the Crown on behalf of all Maori. The Committee held, however, in its decision issued in November 2000, that the settlement did not breach the authors' rights under the Covenant.

*Maori Reserved Land*

280. Maori reserved land received its status in the nineteenth century when confiscated land was returned, and when portions were reserved from purchases by the Crown and the New Zealand Company. This land is held in 2,236 leases, encompassing a total area of approximately 26,000 hectares. Legislation governing the operation of these leases provides that they will be perpetually renewable and that rents will be fixed at 5 per cent of the unimproved value of rural land, and 4 per cent for urban land. These rents are fixed for a period of 21 years.

281. Within the reporting period the Maori Reserved Land Amendment Bill 1996 was introduced to Parliament proposing a move to market rents, so that the Maori owners receive a fair return on their land. This legislation was later enacted, after the present reporting period, in late December 1997, and came into force on 1 January 1998.

**Pacific Island Peoples**

282. In 1996 Pacific Island people made up 5.6 per cent of the total population of New Zealand. Between 1986 and 1996, the population of Pacific Island people in New Zealand increased by 55.2 per cent. The Pacific community is highly urbanized, with just over 97 per cent in urban centres (for example, 62.5 per cent in Auckland, 14.5 per cent in Wellington).

283. The statistical data and information that are available on Pacific Island people shows that:

- Pacific Island peoples' income levels are amongst the lowest for all New Zealanders;
- They have the highest rate of unemployment amongst all New Zealanders;
- Their health status is comparable with that of the Maori population (above paragraph 265);

- Pacific participation and achievement rates in education are comparatively low;

- Pacific people are over-represented in the criminal justice system.

284. There are many Government initiatives under way that are intended to reverse the poor position of Pacific peoples. The *Pacific Directions Report* (Ministry of Pacific Island Affairs, Wellington 2000, attached as Annex DD) provides a cross-sectoral strategy for integrated policy development on Pacific issues.

285. Because of the awareness of the obligations and responsibilities of the New Zealand Government towards Pacific Island communities in New Zealand the Ministry of Justice has issued the *Pacific Peoples' Constitutional Report* (Wellington 2000 attached as Annex DD). This report provides an analysis against the background of New Zealand's international obligations under the relevant international treaties, and section 20 of the Bill of Rights Act and the unique interdependence between the well-being of Pacific Island communities in New Zealand and that of the home island states which New Zealand has historic and sometimes constitutional protective relationships.

**Affirmative Action**

286. In the case of *Amaltal Fishing Company Limited v. Nelson Polytechnic (No. 2)*, (1994) 1 HRNZ 369, the Complaints Review Tribunal under the Human Rights Act 1993 (paragraph 20 of New Zealand's Third Report) found that the publication by a polytechnic institute of a brochure advertising a fishing cadet course for persons of Maori or Pacific Islands descent only, without showing justification for such restriction, breached the Human Rights Act as being discriminatory on the ground of race.

287. It is not, however, initially unlawful for tertiary institutions to target courses at specific races if it can be shown that such courses are provided in good faith for the purpose of assisting disadvantaged groups, and that those groups need assistance or advancement in order to achieve an equal place with other members of the community (in accordance with Section 73 of the Human Rights Act). This has been the position since 1971 and has not been altered by the above decision.

**Arts Council of New Zealand Toi Aotearoa Act 1994**

288. In answer to a question by the Committee relating to New Zealand's Third Report, a description was given of the Arts Council of New Zealand Toi Aotearoa Act 1994 (attached as Annex EE), enacted on 1 July 1994. This established a new structure and functions for the national body previously known as the Queen Elizabeth II Arts Council of New Zealand. A new national body known as the Arts Council of New Zealand Toi Aotearoa (Creative New Zealand), and two arts boards of equal status, were created under the new legislation.

289. The Arts Council is an independent statutory body which operates at arms length from the Government - there is no provision in its legislation for Ministerial control of its activities. The Council is responsible for setting overall policy of the organisation, and apportions funding

between the two arts boards. One board, known as Te Waka Toi, funds Maori arts; the other, the Arts Board, supports the arts of all New Zealanders. The creation of the Te Waka Toi is in itself recognition of the important role that Maori play in the arts of New Zealand. The new legislation also includes provision for a statutory South Pacific Arts Committee of the Arts Board to provide support for Pacific Island art.

290. The Act stipulates that in achieving its purpose the Council shall recognize, inter alia, "the cultural diversity of the people of New Zealand ... the role in the arts of Maori as tangata whenua" and, "the arts of the Pacific Island people of New Zealand".

291. The Arts Council's strategic plan covering the three year period, 1995-1998, presented a strongly stated commitment to the development of Maori art in New Zealand. Its goals included: increasing Maori participation in *nga toi Maori* (Maori art), supporting the maintenance and development of Maori arts and artists, and assisting in developing links between Maori artists and artists from other indigenous cultures.

**Eliminating Disparities**

292. A key task the present Government has set for itself is eliminating disparities in New Zealand society, including those between Maori and Pacific communities and other New Zealanders. It has taken the following measures:

- The appropriation of an extra NZ$ 12 million over the next four years (until 2004) to Te Puni Kokiri (Ministry of Maori Development) to monitor the effectiveness of social policy programmes for Maori;

- Disclosure in departmental annual reports of what steps are taken to eliminate disparities between Maori and Pacific Island peoples and other New Zealanders. Chief Executives of the departments will be held accountable for the effectiveness of their measures;

- The appropriation of NZ$ 114 million over the next four years (until 2004) to build the capacity of Maori and Pacific Island peoples to design and deliver their own initiatives;

- The appropriation of an additional NZ$ 8 million over the next four years (until 2004) to the Maori Land Court to help overcome the barriers of multiple ownership;

- The provision of an extra NZ$ 50 million for initiatives to eliminate disparities that develop between budgets.

293. A detailed analysis of the initiative to eliminate disparities will be undertaken in New Zealand's next periodic report.

# TOKELAU

## Introduction

294. This report relates to Tokelau. It supplements the Third Report which had covered the period up to the end of 1993, and reflects the following factors:

- The most significant developments in Tokelau relating to the implementation of the Covenant have continued to concern the development of local institutions of government. Under the constitutional programme which New Zealand and Tokelau have been following since 1992, Tokelau is provided with formal powers to enable it to establish and operate its own national government;

- Tokelau well understands that it is bound by a number of international human rights treaties, including the present Covenant. A booklet produced in Tokelauan and English in 1990 included the main human rights documents of relevance to Tokelau;

- At this stage in Tokelau's constitutional evolution, questions concerning the application of the Covenant remain formally the responsibility of the New Zealand Government;

- Tokelau is giving early attention to a Constitution, including the mode of reflecting therein its commitment to human rights.

## PART I: GENERAL

### Overview

295. In July 1994 a United Nations visiting mission (the fourth since 1976) was informed that Tokelau had under active consideration both the Constitution of a self-governing Tokelau, and an act of self-determination. No set timetable was specified. Tokelau also then expressed to the mission its preference for a future status of free association with New Zealand.

296. In evaluating the present constitutional programme, the overriding consideration to be borne in mind is Tokelau's need to work from a local framework, devising for itself governance arrangements that can fit a far from conventional, decolonization context. This is because Tokelau comprises only three villages, which have been largely autonomous for centuries, located on widely dispersed atolls some 500 kilometres from Samoa and with a total population of only about 1,500 people. There has never been a resident New Zealand administrative presence. In the 1990s the Tokelauans themselves have seen a need to develop their own capacity to interact with the world outside, hence their recognition of the need to develop a national governing capacity.

297. Tokelauans are devising governance arrangements to cover the needs of each village as well as those of national government. A special feature of the situation has been the need to relocate to the atolls the Tokelau Public Service which developed in its present form from the

1970s, on a New Zealand model and under New Zealand control, from a base in Samoa (which had been selected taking account of the limited state of communications with, and within, Tokelau at that time). The development in the 1990s of a national government capacity, where political control comes collectively from the villages of Tokelau, underlined the need to change this older framework.

298. It is clear that Tokelau's ability to form a new nation depends upon its ability to adapt its three village governance structures, and a home-grown solution is obviously called for. There is in the village a cohesive social structure based on family and the principle of sharing, underpinned by a consensual style of decision-making around a male, hierarchical base. The only Tokelauan word for law is *tulafono*, or custom of the elders.

299. Two relevant processes have been under way since 1994. At the formal national level, New Zealand has acted to devolve executive and legislative powers to Tokelau. Firstly, on 27 January 1994, the Administrator's powers, which cover administration of the executive government of Tokelau, were delegated to the General Fono (the national representative body), and when the General Fono is not in session, to the Council of Faipule (a Cabinet-equivalent body established in 1993). Secondly, the Tokelau Amendment Act which was passed by the New Zealand Parliament in 1996, and entered into force on 1 October of that year, conferred on the General Fono a power to make rules for the peace, order and good government of Tokelau, including a power to impose taxes.

300. The second process has taken place in Tokelau: operationally in the sense that the General Fono and the Council of Faipule have gained experience in the exercise of executive and legislative powers (in a cultural context in which the Western notion of separation of powers has never taken root): and conceptually in terms of considering how governance arrangements for village and nation might best be structured. The route has been to arrange the foundation, which is the village, before arranging the nation.

301. Tokelau is following the approach, first, of devolving most public service functions to the village, and secondly, of making all authorities, including the Tokelau Public Service, directly accountable to Tokelau institutions. It is envisaged that national government should undertake only what the villages individually cannot do: broadly, that is, to manage business which relates to, or derives from, Tokelau's relations with the world outside. In seeking to establish the village properly as the core, Tokelau is thinking in economic as well as governance terms. It has been concerned that the spirit of self-help, which marked earlier subsistence times, has been disappearing.

302. The New Zealand State Services Commissioner has a statutory responsibility to administer the Tokelau Public Service. In order for Tokelau to assume responsibility for its public service (however that may be structured in future), a further formal step is needed by New Zealand: the repeal of the relevant legislation (the Tokelau Amendment Act 1967 Part I). New Zealand is committed to taking that step as soon as Tokelau is ready. A preparatory step was taken in 1993 when the State Services Commissioner delegated his powers to two Tokelau Public Service Commissioners, one New Zealand-based and one Tokelau-based.

303. In late 1994 the General Fono established a broadly based Special Constitution Committee. Over five weeks from March 1995, constitution workshops were held on each atoll. The discussions were broad ranging and widely attended. This process stimulated public interest in what a Constitution was and what it meant, and led to a clearer identification of Tokelau needs and desires. The Committee held several meetings subsequently, and issued an initial report in the Tokelauan language in late 1996. A two part dual-language report - *Elements of the Constitution* - appeared in October 1997. That report included a commentary by Tokelau's legal adviser, Professor A.H. Angelo of Victoria University of Wellington.

304. The report reflected the desire for greater self-reliance of government in Tokelau, for clear expression of the rules about the use of power in the community, and a strong sense of the nature and importance of the relationship with New Zealand. There was a consensus that the General Fono should consider possible implementation of aspects of the report in advance of a final decision on the future Constitution of Tokelau.

305. Tokelau's approach to Constitution-making thus reflects its approach to governance: of shaping arrangements according to Tokelau needs and traditions, while also seeking to find a good balance between the traditional and the imported. Tokelau is not following the immediately easier example of other countries which have in their evolution used borrowed constitutional models.

**The Core Question of Law and Custom**

306. In Tokelau, custom and law interact to an increasing degree, reflecting Tokelau's increasing contact with the outside world, and the development of self-government with a view to the exercise by Tokelauans of their right to self-determination.

307. The distinctive background outlined above makes this process unusually challenging. Because, traditionally, government in Tokelau is on a village by village basis, there has been little in the Tokelau system that takes a formal shape recognizable externally. Custom (a body of rules in principle known to and understood by all members of the community) is at the heart of the system. Much of it is unwritten but hallowed by tradition and by regular reinforcement in practice.

308. Self-determination as such is possible only when Tokelau has experience of self-government at the national level, and has established political structures which make meaningful its choice of one of the political status options offered under relevant resolutions of the United Nations General Assembly. This exercise is a sensitive one, in the first place because the Tokelau-wide structures upon which self-government necessarily is being built derive their formal powers from an external authority which has never significantly impinged on village life; and secondly because, as mentioned above, the only socially known rules in the villages are customary ones within an oral tradition.

309. As a major step along this path, a programme for law reform in Tokelau has been under way since the late 1970s. After 1985 this programme became the Tokelau Law Project (with UNDP funding). The Project has played a major role in developing the law of Tokelau, in informing its people about the nature of law and how it could be used for their benefit, and in making it linguistically available to Tokelauans. Today it is acknowledged that imported law meets certain needs, especially for the whole of Tokelau as distinct from a single village.

310. Tokelau well understands the need for the law reform programme to take into account international human rights standards. The initial report on a Constitution (above paragraph 303) includes these (draft) provisions

- Individual human rights for all people in Tokelau are stated in the Universal Declaration of Human Rights and are implemented in the International Covenant on Civil and Political Rights;

- The rights of individuals in Tokelau shall be exercised having proper regard to the duties of other individuals, and to the community to which the individual belongs.

311. This early attention being given to a Constitution, and to how Tokelau might reflect there its commitment to human rights, indicates that Tokelau should be well equipped to address how it would wish, in a post-self-determination context, to give local effect to that commitment.

312. Tokelau at the same time seeks understanding of its situation, and particularly of the challenge inherent in moving from socially known rules in an oral tradition to written law of the Western conception. For as Tokelau considers its commitment to basic human rights, it is mindful that human rights promote the imported notion of individuality, while the idea of community, with which Tokelauans are familiar, promotes a sense of unity and sharing.

313. So what is involved is a considerable evolution away from tradition. For Tokelauans this means a move away from following a particular set of rules and practices within their cultural setting, to following a set of rules and practices recognizable as consistent with life in the international community, and the rules and practices of other States.

## PART II: INFORMATION RELATING TO SPECIFIC ARTICLES

314. Information on Tokelau relating to specific Articles of the Covenant follows.

### ARTICLE 1

315. The development of Tokelau towards the exercise of its right to self-determination is outlined in Part I immediately above, and in Part II, paragraph 42 of the New Zealand Report.

316. Questions involved in the preparation for self-determination have been identified broadly in the ongoing dialogue between New Zealand and Tokelau. An 11 page statement (*The Voice of Tokelau*) made by Tokelau to the United Nations visiting mission in 1994, contained Tokelau's "blueprint" for self-determination.

317. The following indication of New Zealand thinking was provided in a statement of May 1995 to the United Nations Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

> What [Tokelau's statement to the 1994 United Nations visiting mission] reflects is the principle that a former administering power and the international community should make specific efforts to help a very small country facing constraints of Tokelau's type. Such assistance would be of an ongoing type. The central thought is that after self-determination, Tokelau would not be cut adrift and that New Zealand, besides other external partners in their appropriate ways, would see it as part of their function to help Tokelau succeed.

## ARTICLE 2

318. The direction of Tokelau thinking accords with the tenor of this article.

## ARTICLE 3

319. While there is a clear demarcation between male and female roles in Tokelau culture, there is nothing in the laws of Tokelau sanctioning any kind of discrimination against women. In general, women enjoy the same rights as men. Since 1994, each village delegation to the General Fono has included one woman. In employment, a significant promotion of gender equity is under way.

## ARTICLE 14

320. Tokelau will determine the final shape of its judicial system as its work on a Constitution reaches completion. The collaboration of the New Zealand Parliament will be necessary before the final court structure that Tokelau approves can be put in place.

321. Currently the judges of Tokelau are the Law Commissioners of each island. These are lay officers who perform their duties with the village councils in the context of the village structures and local tradition. In the fulfilment of their roles, Law Commissioners typically are informed more by custom than legislation. They are concerned primarily with criminal offences of a minor nature and, in cooperation with the local police officers, deal with offenders by way of reprimand, sentences of community service or fines. There are no prisons in Tokelau. In case of need, major criminal or civil matters would be dealt with by the High Court of New Zealand acting as a Court for Tokelau, and that Court may also hear appeals from the Tokelau Law Commissioners.

322. The requirement of the availability of defence counsel, at public cost if necessary, presents practical problems for a community of Tokelau's type, given its small population (1,507 people in the 1996 census) and physical isolation. The institution of counsel is unknown in Tokelau culture and there have been no lawyers in Tokelau. Accordingly it would not be easy to resolve the requirements for defence and prosecution counsel: the practical and economic problems could not easily be resolved.

323. Nor has any dispute from Tokelau ever been litigated outside Tokelau. There has been a strong community feeling that disputes are matters for the community and the community alone. This has meant that, to date, community thinking has been opposed to any thought of having a case decided in another village, let alone outside Tokelau.

324. A new crime regulation system, and related procedures, have been developed within the Tokelau Law Project already referred to. The new draft code was developed in close consultation with elders in order to ensure that it reflects actual Tokelau needs, is consistent with Tokelau custom, and is determined by what is appropriate for Tokelau. It is consistent with Tokelau's obligations under international law regarding human rights issues. Tokelau is now able to implement these proposals, following passage of the Tokelau Amendment Act 1996. The General Fono's initial focus, however, insofar as the exercise of its legislative power is concerned, has been on the management of major economic activities of Tokelau.

## ARTICLE 25

325. Under longstanding practice, two village leadership positions - Faipule and Pulenuku (one with an external focus and the other with an internal one) - are filled on the basis of three yearly elections, by universal adult suffrage. Most recently, on the basis of a decision taken by the General Fono in 1998, Tokelau has moved from a system of appointment by each village of its delegates to the General Fono, to a system of election of delegates. The first such elections were held in January 1999, when each village elected six delegates for three year terms.

## LIST OF ANNEXES

***Annex A*** *Simpson v. Attorney-General (Baigent's Case)* [1994] 3 NZLR 667

***Annex B*** New Zealand Law Commission Reports:

*Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v. Derrick*, NZLC R37, Wellington 1997

*A New Zealand Guide to International Law and its Sources*, NZLC R34, Wellington 1996

*Community Safety: Mental Health and Criminal Justice Issues*, NZLC R30, Wellington 1994

*Police Questioning*, NZLC R31, Wellington 1994

***Annex C*** *Moonen v. Film and Literature Board of Review* (1999) 5 HRNZ 224

***Annex D*** United Nations Commission on Human Rights' Working Group on the Draft Declaration on the Rights of Indigenous Peoples (Geneva, 27 October - 7 November 1997): Statement of 30 October 1997 by New Zealand Delegation

***Annex E*** Annual Reports of the Human Rights Commission and Race Relations Conciliator for periods ended June 1994, 1995, 1996 and 1997; Annual Reports of the Privacy Commissioner for periods ended June 1994, 1995, 1996 and 1997

***Annex F*** Human Rights Amendment Act 1999 and (unenacted) Human Rights Amendment Bill 1998 Crimes Amendment Act 1995

***Annex G*** Sylvia Dixon, *Pay Inequality between Men and Women in New Zealand*, Department of Labour, Occasional Papers, Wellington 2000

***Annex H*** New Zealand Second Periodic Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

***Annex I*** Crimes Amendment Act 1995

***Annex J*** Annual Reports of the Police Complaints Authority for periods ended June 1994, 1995, 1996, 1997, 1998 and 1999

***Annex K*** Inquiry under Section 47 of the Health and Disability Services Act 1993 in respect of Certain Mental Health Services: Report of the Ministerial Inquiry (Mason Report)

***Annex L*** Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992, June 1997

***Annex M*** *R. v. Leitch* [1998] 1 NZLR 420

***Annex N*** Alison Church, Stephen Dunstan, *The Evaluation of the Home Detention Pilot Programme 1995-1997*, Ministry of Justice, Wellington 1997

***Annex O*** *Conviction and Sentencing of Offenders in New Zealand 1987 to 1996* containing extract "Court Statistics on Young Offenders", Ministry of Justice, Wellington 1997

***Annex P*** Penal Institutions Amendment Act 1994

***Annex Q*** *Getting Kids Out of Prisons*, Discussion Paper on the Future Management of Serious Young Offenders in Custody, Department of Corrections, October 1998

***Annex R*** Criminal Investigations (Blood Samples) Act 1995; extract from New Zealand Police Annual Report to Parliament for 1997/98 relevant to Section 76 of the Act (*Parliamentary Paper G6*)

***Annex S*** New Zealand Government Statement of Policy on Family Violence, Department of the Prime Minister and Cabinet and the Department of Social Welfare, June 1996

***Annex T*** Domestic Violence Act 1995

***Annex U*** Convention on the Rights of the Child: Presentation of the Initial Report of the Government of New Zealand

***Annex V*** Guardianship Amendment Act 1995

***Annex W*** *Breaking the Cycle - An Interagency Guide to Child Abuse*; *Breaking the Cycle - Interagency Protocols for Child Abuse Management*, Children, Young Persons and Their Families Service, Wellington 1995

***Annex X*** Child Support Review 1994: Report of the Working Party (Trapski Report), plus report on government implementation

***Annex Y*** Citizens Initiated Referenda Act 1993 (reprinted, as amended, as at 1 February 1996)

***Annex Z*** *Taiaroa v. Ministry of Justice* [1995] 1 NZLR 411

***Annex AA*** Briefing materials issued by the Office of the Minister in Charge of Treaty of Waitangi Negotiations regarding the Waikato and Ngai Tahu Settlements effected under the Treaty of Waitangi

***Annex BB*** *The Climate of Race Relations in New Zealand*, New Zealand Official Yearbook 1997

***Annex CC*** Statutory Regulations 1998/72 and 1998/434 - the Fisheries (South Island Customary Fishing) Regulations 1998, and the Fisheries (Kaimoana Customary Fishing) Regulations 1998

***Annex DD*** *Pacific Directions Report*, Ministry of Pacific Island Affairs, Wellington 2000; *Pacific Peoples' Constitutional Report*, Ministry of Justice, Wellington 2000

***Annex EE*** Arts Council of New Zealand Toi Aotearoa Act 1994

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